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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON
Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Seventh Circuit err in adopting—in conflict with a majority of the Circuits—a "default rule" which requires courts in that Circuit, absent clear and express contract language to the contrary, to conclusively presume that collectively bargained entitlements to retiree insurance benefits are intended to last only for the duration of the agreement creating those entitlements and not for the duration of the retiring employees' lives.

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PETITION FOR WRIT OF CERTIORARI

Norman Senn, Clemens Kien, Paul Gilmore, John Gross, and Jack Hudson, individually and on behalf of the class of plaintiffs they represent, hereby petition for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Senn, et al. v. United Dominion Industries, Inc., et al.*, 951 F.2d 806 (Jan. 8, 1992).

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Seventh Circuit is reported at 951 F.2d 806, and is reproduced in Appendix A (1a-26a). The opinion of the United States Court of Appeals for the Seventh Circuit, denying the petition for rehearing with suggestion for rehearing *en banc* filed by Senn, *et al.*, is reported at

965 F.2d 655 (May 5, 1992), and is reproduced in Appendix F (68a-70a). The opinion and injunction issued by the United States District Court for the Eastern District of Wisconsin, dated September 10, 1990, are unreported, and are reproduced as Appendix B (27a-36a) and Appendix C (37a-38a), respectively. The opinion of the District Court denying petitioners' motion for summary judgment is unreported, and is reproduced as Appendix D (39a-62a). The jury verdict of December 11, 1989, with respect to the question of contract interpretation, upon which the District Court's order is, in part, based is reproduced as Appendix E (63a-67a).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit were issued on January 8, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 5, 1992. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

The United States District Court for the Eastern District of Wisconsin had jurisdiction of this case under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185, and section 502(e)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(e)(1). The Seventh Circuit had jurisdiction of this case pursuant to 28 U.S.C. § 1292(a)(1).

STATUTORY PROVISIONS INVOLVED

Section 301 of the Labor Management Relations Act ("LMRA") of 1947, 29 U.S.C. § 185, provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Sections 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3), provide:

> (a) Persons enpowered to bring a civil action.
>
> A civil action may be brought—
>
> (1) by a participant or a beneficiary—
>
> * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

STATEMENT OF THE CASE

Petitioners represent a class of approximately one hundred retirees who were formerly employed by respondent, Pressed Steel Tank, Inc. ("PST").[1] Each petitioner qualified for lifetime pension benefits under the collective bargaining agreement and pension plan in force at the time of his or her retirement. And, under the collective bargaining agreement in force at the time of each petitioners' retirement, each petitioner was also entitled to health and life insurance benefits upon retirement. The question here is whether the retiree insurance benefits in the pertinent collective bargaining agreements were in-

[1] Respondent, United Dominion Industries, Inc., which was formerly AMCA International, was the parent corporation of PST from 1982 to 1987. Except where context requires otherwise, PST and United Dominion Industries, Inc., or PST and AMCA International will be referred to jointly as "PST." Respondent New Pressed Steel Tank Co., Inc., purchased PST from United Dominion Industries, Inc., in 1987.

tended to be lifetime benefits or merely to extend for the duration of the agreement then in force.

1. *The Collective Bargaining Agreements.* The contractual right to retiree insurance is contained in a series of five collective bargaining agreements, covering the period 1975 through 1988, between PST and the United Steelworkers of America, AFL-CIO-CLC ("Union"). Because members of the class represented by petitioners retired under each of these five agreements, it is necessary to describe the relevant provisions from each agreement.

In section 24 of the 1975-1978 agreement, entitled Insurance and Pensions, the parties agreed to provide retiree insurance coverage by referencing a descriptive booklet issued in 1973:

> 24.1.a. The Company shall select the insurance carrier(s) to provide the benefits provided in the Insurance Plans and agrees to continue the plans as described in the Insurance Booklet dated June 12, 1973 entitled "Insurance Plan for Employees and Their Dependents Covering Hourly Employees—Life Insurance, Accident and Sickness, Hospital Surgical Expense—Major Medical Expense" and as revised.
>
> b. The Company will continue for retired employees, the WPS Medicare Supplemental Plan premium contribution of $3.90 per month and $4.00 Medicare "B" refund.

Petitioners' Appendix ("Pet. App.") 3a.[2]

Under the heading "Termination of Coverage," the 1973 descriptive booklet, incorporated by reference in

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[2] Section 24 of the agreement also contains a subsection dealing with pensions. In contrast to the language addressing retiree insurance, the provision addressing pensions specifies that: "The Company agrees that *for the duration of this Agreement* it will continue to maintain the Pressed Steel Tank Hourly Pension Plan as amended by making a contribution each year in support of the Plan. . . ." Appendix in the Court of Appeals ("App.") 325 (emphasis supplied).

the 1975-1978 agreement, provides with respect to *active* employees that "all coverage terminates at the end of the month in which employment terminates and seniority is lost," but the booklet directs *retiring* employees to "see 'Retirement' . . . below." Pet. App. 3a. Two sections related to retirement follow, one of which states:

> Retired Employees
>
> Upon retirement, participating employees should contact the Personnel Office to transfer directly into the pension group plan with no lapse of coverage. This change must be made within 30 days of the date of retirement.

Pet. App. 4a.[3]

The 1978-1981 and 1981-1984 agreements contain language identical to that found in section 24.1.a. of the 1975 agreement,[4] except that the insurance booklets referred

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[3] The second provision related to retirement in the June 12, 1973, insurance booklet provides:

> On retirement under the Normal, Disability, or Early Retirement provisions of the Pressed Steel Tank Hourly Pension Plan, at the end of the calendar month in which employment terminates, Accident and Sickness coverage terminates and Term Life Insurance Coverage reduces to $1,000. . . . Special Hospital-Surgical Expense coverage is available to the retired employee or the retired employee and his deepndents if he makes the required quarterly contributions in advance for the coverage desired.

Pet. App. 4a.

In negotiating the 1975-1978 agreement, the parties also decided that agreed-upon improvements in the insurance plan would be incorporated into a 1976 insurance booklet. That booklet, as redrafted by the joint Union-PST Insurance Committee, tracked the language of the 1973 booklet with respect to retiree insurance, but added a schedule of company contributions toward health insurance premiums. Pet. App. 4a.

[4] The 1981-1984 Agreement also includes language setting forth explicitly PST's policy of paying the full cost of retiree insurance:

> 24.1.e.5. Effective 8-01-82 the company will pay the full cost for retiree medical insurance. (No dental, no drug). Coverage

to were the 1976 and 1979 editions. The relevant language in the insurance booklets did not change during the 1978-1981 and 1981-1984 agreements. Pet. App. 5a-6a.

The 1984-1986 agreement contains the following provisions which are applicable to the insurance benefits of retirees, as well as to those of employees: [5]

> 24.1.a. The Company reserves the right to select or change the insurance carrier(s) or to self fund the negotiated group benefits.
>
> b. The existing group medical, life, dental and accident and sickness coverage in effect on July 31, 1984 will be continued until the new group benefit plans become effective on October 1, 1984.
>
> c. The existing group medical plan will be eliminated. In its place the company Comprehensive Health Plan will be installed. Employees will have the option of selecting the Company's Comprehensive Health Plan or one of the following Health Maintenance Organizations (HMO's): [list of HMO's] . . . The Company will pay the full premium contribution for either option.
>
> * * * *
>
> g. Each employee shall be furnished a copy of the Group benefits booklet which shall contain the benefits negotiated.

Pet. App. 6a-7a.

Finally, the last collective bargaining agreement in the series, the 1986-1988 agreement, provides as follows:

> 24.1. Group medical and life coverages and Medicare Part B reimbursement for (a) current retirees and (b) employees who retire during the current contract

---

will include "carve out" provision and full Medicare-B-refund for retiree [sic] over 65.

Pet. App. 6a.

[5] The insurance booklet unilaterally drafted by the employer, *see infra* n.6, makes this clear. *See* Pet. App. 7a.

shall be continued during the term of this Agreement.

Pet. App. 9a.

2. *Extrinsic Evidence.* There is significant extrinsic evidence which—the jury found and the district court confirmed—demonstrated that the parties intended retiree insurance benefits to continue for the retirees' lifetimes.

First, the negotiating history of the 1984-1986 agreement reveals that the parties understood that retirees were contractually entitled to lifetime insurance coverage. For example, prior to the bargaining that culminated in that agreement, LeRoy Silampa, an Industrial Relations Manager for the new parent company of PST, *see* n.1, *supra*, consulted with PST's local counsel, who advised Silampa that past retirees would have to agree to any decrease in health insurance benefits. *See* Trial Transcript ("Tr.") 57; Plaintiffs' Exhibit ("Pl. Ex.") 27. In addition, in the course of bargaining the Union rejected PST's proposals that "Employee and retiree benefits will apply only during the term of the agreement," and that retirees pay 20% of the premium contributions for the new plan. The Union position was that past retirees had vested benefits which could not be negotiated away. Record ("R.") 80, pp. 42-45; Pl. Ex. 14, p. 5; R. 81, pp. 22, 78; Tr. 277-81.[6]

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[6] As extrinsic evidence of the meaning of the 1984-1986 agreement, PST introduced an insurance booklet purporting to describe the benefits negotiated in that agreement, which PST issued in April 1985. In contrast to past insurance booklets, the 1985 booklet was authored by PST alone, and not by a joint Union-PST insurance committee. Pet. App. 7a. For the first time, the insurance booklet contained language providing that life and health insurance would terminate when the earliest of the following events occurred: "the date the plan is terminated," or "upon expiration of the labor agreement unless extended, modified or amended by a subsequent agreement." *Id.* at 8a. The booklet further represented that: "The right is reserved in the Plan for the Plan Sponsor to terminate, suspend, withdraw, amend or modify the Plan in whole or in part at any time, subject to the applicable provisions of the Plan." *Id.*

Second, during negotiation of the 1986-1988 agreement, PST several times acknowledged its understanding that retiree insurance benefits were for life. For example, PST's original objective in these negotiations was to eliminate retiree medical insurance for employees who would retire *after November 1, 1986*. Tr. 97-100; Pl. Ex. 35. At the time PST made this proposal, the November 1, 1986, cut-off date would have created a two-month grace or window period in which employees could retire in order to lock in lifetime insurance benefits. And, as a consequence of PST's bargaining proposal, many employees applied for retirement in order to ensure their right to lifetime retiree insurance benefits under the 1984-1986 agreement. After the 1986-1988 agreement was reached, based on the understanding that employees retiring under that agreement would be entitled to the same lifetime retiree insurance benefits as under prior agreements, the employees who had applied to retire during the window period were given a few days' grace period to rescind their retirement applications and return to active status. R. 80, pp. 81-82.

In this connection, in assessing the number of employees who might retire in the proposed window period prior to expiration of the 1984-1986 agreement, Industrial Relations Manager Silampa wrote: "the enticement of *lifetime* company-paid health care is a strong inducement." Pl. Ex. 30, p. 3; Tr. 66-70 (emphasis supplied). Similarly, Silampa's notes of conferences with PST's chief negotiator and with PST's president refer to retiree insurance coverage as "Co.-Paid Health care for life" and "lifetime coverage." Tr. 78-79, 81; Pl. Exs. 32, 33. And the notes of PST's Personnel Manager James Otto, made during a managerial discussion of PST's contract proposals, similarly state: "[w]ill put in a window—keep benefits *for life*." R. 80, pp. 65-66; Pl. Ex. 16 (emphasis supplied).[7]

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[7] *See also* Tr. 25, 28-38; Pl. Exs. 25, 26 (cost projections of PST's Comptroller assessing costs of insurance under PST's proposals for each retiree for life).

Third, PST's 1987 sales contract with the purchaser of its steel plant, *see* n.1, *supra*, manifests PST's recognition that its retirees were entitled to lifetime insurance benefits. Under the agreement, the purchaser assumed a significant portion of PST's liabilities and obligations with respect to retiree health and life insurance benefits. *See* Section 3.03 of Pl. Ex. 23, pp. 5-6; Tr. 128-29; *see also* Pl. Ex. 38. The sales agreement listed the name of each PST retiree to whom PST was liable for retiree insurance benefits and stated the medical insurance cost for each such retiree *projected on the basis of his or her life expectancy*. Moreover, in the sales agreement, a benefit commencement date was listed for each retiree, but no termination date was stated. *Id.*

Finally, petitioners presented evidence at trial that PST representatives had orally explained retiree pension and insurance benefits to members of the plaintiff class and had never stated that insurance benefits could be cut off, but, to the contrary, had stated that such benefits would be for life. Tr. 146-49, 163-69, 253-54, 257.

3. *The Lawsuit.* On July 31, 1988, after the expiration of the 1986-1988 agreement between PST and the Union, PST refused to provide further health insurance benefits to persons who had retired under any of the five agreements just described. The petitioners then filed a complaint in the United States District Court for the Eastern District of Wisconsin, alleging, *inter alia*, that respondents' refusal to continue to provide insurance coverage to the retirees violated respondents' obligations under the collective bargaining agreements, and thus under section 301 of the LMRA, 29 U.S.C. § 185(a), and violated sections 502(a)(1)(B) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3).[8]

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[8] On December 21, 1988, the district judge certified the case as a class action pursuant to Fed. R. Civ. P. 23(b)(2), the class being retired hourly employees who worked for PST after November 1975, their spouses and eligible defendants. Pet. App. 11a.

4. *Decisions Below.* Petitioners filed a motion for summary judgment on their claims under section 301 of the LMRA and sections 502(a)(1) and (a)(3) of ERISA. On May 9, 1989, the district court denied the motion, holding that the collective bargaining agreements were ambiguous with respect to the duration of retiree insurance benefits, and that the evidence did "not warrant summary judgment for the plaintiffs." Pet. App. 39a. The court, however, granted the retirees' motion for a jury trial.

A jury trial was conducted from December 4 through December 11, 1989. In addition to submitting the basic question of contract interpretation to the jury, the district court, utilizing a special verdict form, asked the jury to state its opinion on the legal question whether the collective bargaining agreements were ambiguous with respect to the duration of retiree insurance benefits. The jury, acting in an advisory role with respect to this legal question, concluded, as the district court had, that the agreements were ambiguous. The jury then, having heard the extrinsic evidence of the parties' intent, determined that the bargaining parties' intent was to provide lifetime insurance benefits to retirees. Pet. App. 63a.

The retirees and defendants each then filed motions for the entry of judgment in their favor. The district court granted the retirees' motion and issued an injunction on their behalf on September 10, 1990. Pet. App. 27a-38a. The court reaffirmed its earlier decision that the collective bargaining agreements were ambiguous, and expressed its agreement with the jury's interpretation of those agreements:

> Having listened to testimony about what the parties to the agreements intended as far as welfare benefits are concerned, I am convinced that the credible testimony is that everyone assumed that the benefits were lifetime benefits [Pet. App. 33a].

A panel of the Seventh Circuit reversed, stating as follows:

> The district court held that the Collective Bargaining Agreements and plan documents were ambiguous, as they referred to continued coverage for retirees, which could be interpreted to mean that the company "would provide benefits for the life of those who retire during the term of the contract . . . ." Thus, the trial court held that resort to extrinsic evidence was necessary to resolve the issue of the plaintiffs' entitlement to lifetime welfare benefits. We disagree. The default rule in this Circuit is that "entitlements established by collective bargaining agreements do not survive their expiration or modification." Thus, it requires more than a statement in a CBA that welfare benefits "will continue" to create an ambiguity about vesting, for the logical interpretation under our rule is that benefits "will continue" for the duration of the contract. Moreover, the Collective Bargaining Agreements and plan documents at issue are either silent on the question of whether a right to lifetime benefits should vest or appear to explicitly prohibit such vesting (i.e., the 1985 and 1986 Insurance Booklets and the 1986-88 Collective Bargaining Agreement). The mere silence of Collective Bargaining Agreements and plan documents concerning the vestment of welfare benefits fails to give rise to an ambiguity. [951 F.2d at 816 (citations omitted)].

The retirees moved for rehearing and rehearing *en banc*. The Seventh Circuit denied the retirees' motion with three judges dissenting from the denial of rehearing *en banc*. The dissenters noted that the panel's "default rule" was at odds with the approach taken by all other Circuits to address the question of the duration of collectively bargained retiree insurance benefits and stated that the panel's "departure from settled principles of contract interpretation [was] unwarranted and presents an important issue for ERISA and labor law." Pet. App. 70a.

REASONS FOR GRANTING THE WRIT

Eight Circuits have addressed the rules to be applied by the federal courts in ascertaining the intended duration of collectively bargained entitlements to retiree insurance benefits. The Circuits have adopted at least three different and conflicting approaches to determination of this contract issue. The "default rule" adopted by the Seventh Circuit in the instant case is in direct conflict with the rules of interpretation adopted by the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. And there is further conflict within the latter seven circuits on this issue, with the Fifth and Eighth Circuits having expressly rejected the inference of lifetime retiree insurance benefits adopted by the Fourth and the Sixth Circuits.

It is important that the Circuit conflicts on this issue be promptly resolved. The large number of cases that have already arisen on the issue reflects the reality that many collective bargaining agreements contain retiree insurance benefit provisions closely akin to the provisions at issue here. As long as the conflicts among the Circuits as to the rules for interpreting such provisions are allowed to persist, the strong federal labor law interest in the uniform interpretation of collective bargaining agreements will be undermined.

I. CONFLICT IN THE CIRCUITS

a. As stated, at least eight Circuits have specifically addressed the question whether provisions in collective bargaining agreements which establish insurance benefits for employees who retire under those agreements, and which do not expressly state the duration of those benefits, should be interpreted as providing such retiree insurance benefits for the duration of the retirement of each such employee or merely for the duration of the collective bargaining agreement in question. The Circuits are in direct conflict as to the rules governing the resolution of this question. Indeed, each of three distinct and conflict-

ing approaches to the issue has been adopted as the governing rule in one or more Circuits.

As already stated, the Seventh Circuit in the instant case adopted a "default rule," that, in the absence of a clear and express statement in the agreement that the retiree insurance benefits are intended to continue beyond the term of the contract, " 'entitlements established by collective bargaining agreements do not survive [the contract's] expiration or modification.' " 951 F.2d at 816. Applying that rule, the court below decided that the district court had erred in determining that, on the question of contract interpretation raised by this case, it is appropriate to consider extrinsic evidence showing that the parties to the agreements here had intended to provide lifetime insurance benefits as part of the ongoing retirement package for all employees retiring under those agreements.

The approach of the Seventh Circuit directly conflicts with the approach of the Sixth Circuit, which has eschewed any such conclusive presumption and indeed has adopted a contrary inference:

> [W]hen the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. [*International Union, United Automotive, Aerospace and Agricultural Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984)].

The Sixth Circuit, in *Yard-Man*, explained the basis for that inference as follows:

> [I]t is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations. The employees are presumably aware that the union owes no obligation to bargain for continued benefits for retirees. If they

> forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. [*Id.* at 1482 (citations omitted)].[9]

Yard-Man and the subsequent Sixth Circuit decisions that recognize the *Yard-Man* inference have made clear that that inference is not intended to be conclusive. To the contrary, at least in the absence of definitive words on the face of the agreement, the decisions of the Sixth Circuit readily accept the relevance of extrinsic evidence to the question of the duration of retiree insurance benefits established by collective bargaining agreements. *See Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1291 (6th Cir. 1991) (contract language virtually identical to that here); *Smith v. ABS Indus. Inc.*, 890 F.2d 841, 842 (6th Cir. 1989) (same).

The *Yard-Man* inference was expressly adopted by the Fourth Circuit in *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989).

The Fifth and Eighth Circuits have expressly declined to adopt the *Yard-Man* inference, while at the same time following an approach that is inconsistent with that of the court below. Thus, in *Anderson v. Alpha Portland*

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[9] Arbitration decision interpreting contracts negotiated prior to *Yard-Man* track *Yard-Man*'s reasoning. *See, e.g., Roxbury Carpet Co.*, 73-2 CCH Arb. ¶ 8521, pp. 4938-39 (Summers 1973) ("[a retiree] ought not to be deprived of . . . rights by events beyond his control in the absence of clear contractual language requiring that result . . . [M]en do not labor for chances on a roulette wheel and employers do not . . . pay wages with lottery tickets"); *B.S. & B. Inc. & Tec Tank*, 80-1 CCH Arb. ¶ 8277 (1980); *Scott & Williams, Inc.*, 22 Steel Arb. 17,337 (Litton 1982), *enforced, Scott & Williams v. United Steelworkers of Am.*, 574 F. Supp. 450 (D.N.H. 1983). In light of these decisions, bargaining parties had no reason to believe that express contract language was required to provide for the vesting of retiree benefits; indeed, they had reason to believe the contrary—that the burden would be on the employer to limit the duration of such benefits.

Indus., Inc., 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989), the Eighth Circuit stated:

> [W]e disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest. Congress explicitly exempted welfare benefits from ERISA's vesting requirements. It, therefore, seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires. The court in *Yard-Man* recognized that no federal labor policy presumptively favors vesting. Because Congress has taken a neutral position on this issue "traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies." *Yard-Man*, 716 F.2d at 1479. We believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences.

This analysis would appear to be as applicable to the *Senn* presumption as to the *Yard-Man* inference. And, in fact, the *Anderson* court—contrary to the approach adopted by the court below—approved of the resort to extrinsic evidence where the contract was ambiguous as to the duration of retiree insurance benefits.

The Fifth Circuit in *United Paperworkers Int. Union v. Champion Int. Corp.*, 908 F.2d 1252 (5th Cir. 1990), agreed with the Eighth Circuit's rejection of the *Yard-Man* inference. In so doing, the court in *United Paperworkers*, like the court in *Anderson*, adopted a position that is at odds not only with the inference of *Yard-Man*, but also with the presumption adopted by the court below:

> To the extent that *Yard-Man* held that there is, as a general proposition, an inference of an intent to vest retirement benefits (because they are "status" benefits), we find merit in the Eighth Circuit's criticism in *Anderson* of this aspect of *Yard-Man* and find no basis in logic or federal labor policy for such a broad

> inference. However, we note that this would not prevent the district court from considering, as some evidence of intent, for example, the fact that retirees have no voice in negotiating a new collective bargaining agreement, a fact of quite general applicability to cases where the vesting of retirement benefits is at issue. In other words, this matter must be determined on a contract-by-contract basis. [*Id.* at 1261-62 n.12].

The First Circuit and the Ninth Circuit, without stating a position on the *Yard-Man* inference, have approved consideration of extrinsic evidence on the issue of the duration of contractually created retiree insurance benefits in circumstances in which the rule adopted by the court below would have precluded such consideration. In *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 9 (1st Cir. 1987), the First Circuit stated:

> The contract language—retiree medical benefits "shall be provided" and the "Company shall pay" for retiree insurance—is consistent with a Textron promise to pay retirees' insurance costs throughout their retirement, even after the particular collective bargaining agreement expires.

And, accordingly, the *Textron* court found it appropriate to look to extrinsic evidence as an aid to determining the parties' intent on this question.

Similarly, in *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984), the Ninth Circuit stated:

> The retirement medical insurance plan does not have an explicit expiration date. The labor-management agreement that endorses the plan does have an expiration date, but the insurance program itself is not necessarily bound by this date. Thus, the contractual language does not explicitly address the issue before us [citations omitted].

The Ninth Circuit went on to say: "If the labor-management agreement explicitly addressed the issue

whether retirement insurance benefits were vested, there might be no ambiguity in this contract. Absent express language, however, [it is appropriate to consider extrinsic evidence]." *Id.* at 1225.

Thus, the decisions of the First and Ninth Circuits are also in conflict with the decision below.[10]

b. In addition to the conflict among the Circuits on the rules governing the construction of the duration of collectively bargained retiree insurance benefits, the decision below conflicts with decisions of other Circuits on the more general question of when it is appropriate to consider extrinsic evidence in construing provisions of collective bargaining agreements.

The "default rule" adopted by the court below in effect precludes consideration of extrinsic evidence on the issue of the intent of parties to a collective bargaining agreement as to whether employees retiring under the agreement are entitled to insurance benefits for the duration of their retirement or merely for the duration of that agreement. Under the "default rule," only two possibilities are contemplated: either the contract language clearly and expressly states that the retiree insurance benefits are to extend beyond the term of the agreement, in which case no extrinsic evidence need be considered, or entitlement to the benefits will be conclusively presumed to last only for the term of the contract.

As some of the cases we have already cited illustrate, this rule pretermits the "traditional" mode of analysis

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[10] The Third and Eleventh Circuits have also faced the issue of when it is appropriate to consider extrinsic evidence in determining the duration of contractually negotiated retiree benefits. *See Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 330-31 (3d Cir. 1984); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1504 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989). While the approach of these two Circuits to this issue is not altogether clear, it appears to be consistent with the approach taken by the First and Ninth Circuits, and inconsistent with the approach taken by the court below.

that courts employ in finding and effectuating the parties' mutual intent in a contract case—*viz.*, where the language of the contract is subject to differing interpretations, extrinsic evidence may be brought to bear as a means better to discern the understanding reached by the parties. *See, e.g., United Paperworkers Int. Union* v. *Champion Int. Corp., supra*, 908 F.2d at 1261; *Smith v. ABS Indus., supra*, 890 F.2d at 846-47; *Anderson v. Alpha Portland Indus., supra*, 836 F.2d at 1519; *Bower v. Bunker Hill Co., supra*, 725 F.2d at 1223-24. And several Circuits have held, drawing on decisions of this Court, that in the context of collective bargaining agreements, even the traditional mode of analysis does not provide sufficient resort to extrinsic evidence.

Thus, the District of Columbia Circuit, in *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1986), has held that, in interpreting a collective bargaining agreement, extrinsic evidence should be considered even where the language on the face of the agreement appears dispositive of the issue to be determined. In *Local Union 1395, IBEW*, the question was whether a no-strike clause prohibiting "any strike" should be construed to prohibit a sympathy strike. The District of Columbia Circuit stated:

> Were we faced only with the language of the agreement itself, we would have little trouble upholding the Board's order. But the words parties use in drafting contracts are only evidence of their intent; the words are not themselves the parties' intent. The Board may not, in the guise of enforcing the "plain meaning" of contractual language, erect an inflexible presumption on an issue turning on the parties' actual intent. The intent of the parties to collective bargaining agreements is not to be discerned by reference to "abstract definitions unrelated to the context in which the parties bargained," especially where bargaining history is crucial to an understanding of that intent. [*Id.* at 1036 (citations omitted).]

See also UMWA 1950 Benefit Plan & Trust v. Bituminous Coal Operators' Ass'n, 898 F.2d 177, 181 (D.C. Cir. 1990).

Other Circuits have held that it is appropriate to use a uniquely low threshold for the admission of extrinsic evidence in the interpretation of collective bargaining agreements. *See United Paperworkers Int. Union v. Champion Int. Corp.*, *supra*, 908 F.2d at 1256 ("the construction and application of a collective bargaining agreement's terms cannot be strictly confined by ordinary principles of contract law. The provisions of a labor contract may be more readily expanded by implication than those of contracts memorializing other transactions") (citations omitted);[11] *Southeastern Pa. Transp. Auth. v. Brotherhood of R.R. Signalmen*, 882 F.2d 778, 784 (3d Cir. 1989) ("[w]e find that where a court is called on to interpret a collective bargaining agreement it is generally appropriate for the court to look beyond the face of the collective bargaining agreement"), *cert. denied*, 493 U.S. 1044 (1990); *Dickeson v. Daw Forest Prods. Co.*, 827 F.2d 627, 630 (9th Cir. 1987) ("[c]ourts may, however, expand by implication the provisions of a collective bargaining agreement more readily than the provisions of an ordinary contract").[12]

These decisions find their source in decisions of this Court. Thus, for example, in *Transportation-Communication Employees Union v. Union Pac. R.R.*, this Court stated:

> A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is

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[11] *See also Smith v. Kerrville Bus Co.*, 709 F.2d 914, 917 (5th Cir. 1983); *NLRB v. L.B. Priester & Son, Inc.*, 669 F.2d 355, 365 (5th Cir. 1982).

[12] *See also Arizona Laborers, Teamsters & Cement Masons Local 395 v. Conquer Cartage Co.*, 753 F.2d 1512, 1517 (9th Cir. 1985) (court may consider extrinsic evidence to determine the intent of the parties "with even greater liberality in the case of a collective bargaining agreement").

> it governed by the same old common-law concepts which control such private contracts. It is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. [385 U.S. 157, 160-61 (1966) (citations and internal quotations omitted).]

See also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 311 (1989) (collective bargaining agreements commonly include implied as well as express terms); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579-80 (1960).

The Circuit decisions that emphasize the particular significance of extrinsic evidence in interpreting collective bargaining agreements are at odds with the rule adopted by the Seventh Circuit in the instant case.

II. THE IMPORTANCE OF RESOLVING THE CIRCUIT CONFLICTS RAISED BY THIS CASE

As is apparent from what has already been discussed, the question of the proper approach to determining the duration of collectively bargained entitlements to retiree insurance benefits is a recurring one. Most of the Circuits have addressed the issue, and the results reached, as we have seen, are far from uniform. In the context in which this issue generally arises, such conflicts are particularly troublesome and should not be left unresolved.

It is common for unions to negotiate nationwide contracts that cover all of an employer's facilities throughout the country or a number of different employers' facilities throughout the country or simply to negotiate different contracts containing standard provisions with employers

in various sections of the country. If the conflicts described above were allowed to continue, a given contract provision might be found to have created lifetime entitlements to retiree insurance benefits in some Circuits but not in others.

Such a result runs directly counter to the purposes of Section 301 of the LMRA, 29 U.S.C. § 185, the section that provides federal district courts with jurisdiction over disputes arising out of collective bargaining agreements. Section 301 stands as a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); *accord Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). "[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). *See also Allis-Chalmers Corp. v. Lueck*, *supra*, 471 U.S. at 211 ("[t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretations"). Obviously, conflicts among the Circuits are inimicable to this statutory interest in uniformity.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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August 3, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 90-3100

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, *et al.*,
Plaintiffs-Appellees,

v.

UNITED DOMINION INDUSTRIES, INCORPORATED, formerly known as AMCA INTERNATIONAL CORPORATION, PST, INCORPORATED and PRESSED STEEL TANK COMPANY, INCORPORATED,
Defendants-Appellants.

Argued April 10, 1991

Decided Jan. 8, 1992

Miriam R. Katzman, Zubrensky, Padden, Graf & Maloney, Milwaukee, Wis., William T. Payne (argued), Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, Cal., George Graf, Gillick, Murphy, Wicht & Pracht-hauser, Brookfield, Wis., for plaintiffs-appellees.

Kirk D. Messmer, Allan Gunn, Jay G. Swardenski (argued), Matkov, Salzman, Madoff & Gunn, Chicago, Ill., for defendants-appellants.

Before BAUER, Chief Judge, COFFEY, Circuit Judge, and WILL, Senior District Judge.*

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

COFFEY, Circuit Judge.

United Dominion Industries, Inc., its subsidiary, PST, Inc. ("PST"), and Pressed Steel Tank Co., Inc. ("New Pressed Steel"), the corporation which purchased the assets of PST in January 1987, appeal from the district court's permanent injunction of September 10, 1990. The injunction required the defendants to furnish lifetime health and life insurance benefits to retired PST hourly employees who worked for PST after November 1975, as well as their spouses and eligible dependents. The district court's injunction ordered that the defendants pay the full premium cost for coverage, except for the cost difference between conventional health insurance coverage and HMO coverage for persons who retired after August 1986. The order accompanying the injunction remanded the suit to the magistrate for determination of past damages that retired employees incurred as a result of the defendants' refusal to provide the benefits. We reverse.

I. FACTUAL BACKGROUND

This case concerns the obligations of the defendants to provide health and life insurance coverage for retirees of PST, Inc. under a series of Collective Bargaining Agreements (CBAs) entered into between PST and the United Steelworkers during the period from August 1, 1975 to July 31, 1988. Each one of these CBAs contained a "scope of agreement" provision which read:

> "This Agreement and the supplemental letter agreements executed concurrently herewith constitute the sole and entire Agreement between the parties and supersedes all prior Agreements, oral or written, and expresses all of the obligations of or restrictions imposed on the respective parties during its term. Such Agreement can only be amended by a signed agreement executed by the parties. Such agreement shall be published and made available to employees."

The first Collective Bargaining Agreement between PST and the United Steelworkers relevant to this case covered the period from August 1, 1975 to July 31, 1978. Section 24.1 of that agreement read, in relevant part:

> "24.1 Insurance
>
> a. The Company shall select the insurance carrier(s) to provide the benefits provided in the Insurance Plans and agrees to continue the plans as described in the Insurance Booklet dated June 12, 1973 entitled 'Insurance Plan for Employees and Their Dependents Covering Hourly Employees—Life Insurance, Accident and Sickness, Hospital Surgical Expense—Major Medical Expense' and as revised.
>
> b. The Company will continue for retired employees, the WPS Medicare Supplemental Plan premium contribution of $3.90 per month and $4.00 Medicare 'B' refund.
>
> * * * *
>
> d. The Company and the Union Insurance Committee will meet to revise the Insurance Booklet to incorporate changes either by issuing a new booklet or by issuing supplemental sheets, whichever appears more appropriate."

Prior to revision, the 1973 Insurance Booklet referred to in the CBAs contained the following language relevant to retiree insurance under the general heading of "Termination of Coverage":

> "Termination of Employment
>
> If not previously terminated, all coverage terminates at the end of the month in which employment terminates and seniority is lost (see 'Retirement' and 'Conversion' below).
>
> * * * *

Retirement

On retirement under the Normal, Disability, or Early Retirement provisions of the Pressed Steel Tank Hourly Pension Plan, at the end of the calendar month in which employment terminates, Accident and Sickness coverage terminates and Term Life Insurance coverage reduces to $1,000 (except that if the employee is eligible for a Disability Retirement Benefit his Term Life Insurance coverage will be continued at its present level (usually $7,500) until the end of the calendar month in which he attains age 65, at which time the coverage reduces to $1,000[1]. Special Hospital-Surgical Expense coverage is available to the retired employee or the retired employee and his dependents if he makes the required quarterly contributions in advance for the coverage desired."

The booklet also contained the following provision under the topic of "Additional Information":

"Retired Employees

Upon retirement, participating employees should contact the Personnel Office to transfer directly into the pension group plan with no lapse of coverage. This change must be made within 30 days of the date of retirement."

Thus, the 1975-78 agreement provided for continuing health and welfare benefits for retirees at company expense. The joint union-company insurance committee published a revised Insurance Booklet in December 1976 that contained provisions materially identical to those quoted from the 1973 booklet. The revised booklet did however, add a schedule of the company's contributions toward retiree health insurance. Further, in November 1977 PST filed a summary plan description with the Department of Labor (as required under ERISA) that contained the following language regarding retiree benefits:

> "As an eligible retiree of the Pressed Steel Tank Co., Inc., the benefits listed below are available to you under this plan, with coverage effective upon your retirement date. Benefits include Health, Life and, for Early and Disability retirees, Dental insurance. Coverage will be effective upon your retirement date provided you agree to make any required contributions."

The Summary Plan Description also contained a "Loss of Benefits" section that provided:

> "You must continue to be a member of the class to which the plan pertains and continue to make any of the contributions agreed to when you enrolled. Failure to meet any or all of these requirements may result in partial or total loss of your benefits. The insurance booklet describes conditions which could result in a termination of benefits."

Neither the 1975-78 CBA nor the 1976 Insurance Booklet required contributions from retirees.

The parties entered into a 1978-81 Collective Bargaining Agreements that contained language identical to that found in Sections 24.1a. and 24.1d. of the 1975-78 agreement with the exception that the Insurance Booklet referred to was the 1976 edition. The Insurance Booklet issued in 1979 contained language similar to that of the 1976 Booklet with the exception that the death benefit on term life insurance was increased for retirees and changes were made in the company's contributions for retiree insurance. The bargaining agreement adopted for 1981-84 included the following language setting forth more explicitly the company policy of paying the cost of retiree insurance:

> "24.1 Insurance
>
> * * * *

e. Surgical-Medical

* * * *

5. Effective 8-01-82 the company will pay the full cost for retiree medical insurance. (No dental, no drug). Coverage will include 'carve out' provision and full Medicare-B-refund for retiree [sic] over age 65."

In April of 1982 the joint union-company insurance committee issued a revised Insurance Booklet that increased retiree life insurance coverage to $2,000 and provided that, effective August 1, 1982, all retirees, regardless of retirement date, would have their full insurance premium paid by PST.

AMCA International Corporation (the name under which United Dominion Industries, Inc. operated at all times relevant to this suit) acquired PST as a subsidiary in 1982. Thus, the negotiations for the 1984-86 Collective Bargaining Agreements were the first bargaining sessions in which United Dominion participated, and the resultant agreement included a significant revamping of employee health benefits. The new provisions of the CBA relevant to retiree medical benefits read as follows:

"24.1 a. The Company reserves the right to select or change the insurance carrier(s) or to self fund the negotiated group benefits.

b. The existing group medical, life, dental and accident and sickness coverages in effect on July 31, 1984 will be continued until the new group benefit plans become effective on October 1, 1984.

c. The existing group medical plan will be eliminated. In its place the company Comprehensive Health Plan will be installed. Employees will have the option of selecting the Company's Comprehensive Health Plan or one of the following Health Maintenance Organizations (HMO's):

1. Compcare
2. Family Health Plan
3. Maxicare
4. Samaritan Health Plan

. . . The company will pay the full premium contribution for either option.

* * * *

g. Each employee shall be furnished a copy of the Group benefits booklet which shall contain the benefits negotiated."

The Group benefits booklet issued in April 1985 [1] set forth the following language regarding retiree health insurance:

"The class of Employees also includes eligible Retired Employees (including eligible dependents) who are retired in accordance with the retirement plan of the Company but limited in benefit coverage as follows:

1. Accident and sickness [disability] benefits are only provided to active employees.

2. Dental expense benefits are only provided to Disability Retirees (until they reach age 65) and their eligible dependents. Employees retiring early or at normal retirement age are not eligible for dental coverage.

3. Medical expense benefits, subject to a Medicare 'carve out' limitation, are available to retirees and eligible dependents." [2]

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[1] The Group benefits booklets issued in 1985 and thereafter were written by the company alone rather than a joint union-company insurance committee.

[2] The booklet also provided for life insurance benefits for retired employees.

For the first time the booklet contained language which provided that both life and health insurance would terminate when the earliest of the following events occurred:

> "[T]he date the plan is terminated;
>
> * * * *
>
> [U]pon expiration of the labor agreement unless extended, modified or amended by a subsequent agreement."

An endorsement contained in the booklet further provided that: "The right is reserved in the Plan for the Plan Sponsor to terminate, suspend, withdraw, amend or modify the plan in whole or in part at any time, subject to the applicable provisions of the Plan."

During the 1986-88 CBAs negotiations retiree insurance was a significant issue. PST made proposals to discontinue retiree benefits for persons who had not retired prior to August 31, 1986, and to provide a percentage of payment for insurance benefits to employees who chose to retire early in order to qualify for medical insurance benefits. The parties ultimately agreed to a reduction in the employer contribution for participants electing HMO coverage, and their Collective Bargaining Agreement contained a new Section 24.1j. specifically applicable to retired employees. The relevant provisions of the Collective Bargaining Agreement read as follows:

> "24.1 a. The Company reserves the right to select or change the insurance carrier(s) or to self fund the negotiated group benefits.
>
> b. The existing Comprehensive 80/20 health plan will constitute the Company's regular health plan. Additional HMO options are also available allowing employees the plan of their choice during the annual November open enrollment periods.
>
> * * * *

For participants electing any HMO option the Company will pay the amount it pays for the Comprehensive 80/20 HSM program (currently: Single—$74.00, Family—$214.00 and $62.50—Single, $125—Family for those eligible for Medicare Part B) toward the monthly HMO and the participant will pay any monthly difference for HMO coverage.

* * * *

j. Group medical and life coverages and Medicare Part B reimbursement for (a) current retirees and (b) employees who retire during the current contract shall be continued during the term of this Agreement."

The benefits booklet issued in December 1986, pursuant to the new CBA, contained the same terms providing for the termination of benefits upon the expiration of the union contract or upon discontinuation of the insurance plan as the 1985 benefits booklet quoted above.

In January 1987 New Pressed Steel purchased the assets of PST from AMCA International. New Pressed Steel agreed to assume all liabilities and obligations for retiree health and life benefits with fifty percent of this amount offset against a debt New Pressed Steel owed to PST up to a maximum offset of $400,000. The sales agreement listed the name of each PST retiree to whom PST was liable for retiree health and medical benefits and set forth the medical insurance cost projected for each retiree projected on the basis of the retiree's life expectancy. From the date of sale until the termination of the Collective Bargaining Agreement on July 31, 1988, New Pressed Steel submitted claims to insurance providers, collected premium payments and forwarded the payments to the insurance carriers with the company's contributions. On the July 31, 1988 expiration date of the CBAs between PST and the United Steel Workers, the defendants ceased providing the retirees with any medical or life insurance coverage.

II. PROCEDURAL BACKGROUND

The plaintiffs' complaint, as amended, alleged four causes of action. The first was a request for declaratory and injunctive relief as well as damages under Section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), alleging that requiring the pre-August 1, 1986 retirees to pay any cost for insurance benefits and terminating the insurance coverage of all retirees on July 31, 1988, breached the defendants' obligations under the five Collective Bargaining Agreements.[3] In the second count the plaintiffs sought to receive benefits due and to clarify their rights to future benefits under Sections 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3).[4] The third count was a claim for breach of fiduciary

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[3] Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) provides:

> *"Venue, amount and citizenship*
>
> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[4] These sections provide:

> *"Persons empowered to bring a civil action*
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter of the terms of the plan, or (B) to obtain other appro-

duty under Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1).[5] The final count of the complaint was based upon an implied contract-detrimental reliance theory, alleging that the defendant had assured the retirees of lifetime post-retirement insurance benefits which the retirees relied upon to their detriment in retiring from the defendant's employ. In December 1988, the district judge granted the plaintiffs' request to certify the case as a class action under Federal Rule of Civil Procedure 23(b)(2), with the plaintiffs representing a class consisting of retired hourly employees who worked for PST after November 1975, their spouses and eligible dependents.

One week after the class was certified, the plaintiffs filed a motion for partial summary judgment on their claims under Section 301(a) of the Labor Management Relations Act and Sections 502(a)(1) and (a)(3) of ERISA. The court found that the Collective Bargaining Agreements were ambiguous, permitting the consideration of parol evidence. But, the trial court ruled that "the evidence—the CBAs, summary plans, booklets and deposition testimony—does not warrant summary judgment for the plaintiffs." The court granted the plaintiffs' demand for a jury trial, holding that the plaintiffs were entitled to it because they alleged a legal claim for breach of contract seeking monetary damages.[6]

---

priate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . ."

[5] This section provides:

"(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries. . . ."

[6] The court reaffirmed this ruling after the defendant sought to strike the pliantiffs' jury demand, shortly prior to trial, on the ground that a jury trial is not available in a suit in which the plaintiffs are primarily seeking injunctive relief.

A jury trial was held on December 4-11, 1989. At the close of the evidence the judge submitted for the jury's consideration a verdict form initially requesting that the jury answer the following three questions with respect to persons who retired during the 1975-78 Collective Bargaining Agreement:

> "As to employees of the company who retired when the 1975-78 collective bargaining agreement was in effect:
>
> A-1. Have the plaintiffs convinced you that the 1975-78 collective bargaining agreement between the owners of Pressed Steel and the steelworkers union is unclear and ambiguous as to how long welfare benefits must be paid to retirees?
>
> Yes ——
>
> No ——
>
> If you answered 'yes' to question A-1, then answer the following question.
>
> A-2. Have the plaintiffs convinced you that it is necessary to go outside the agreement to interpret (not vary) what the intent of the company and union was as to the duration of retirees' welfare benefits?
>
> Yes ——
>
> No ——
>
> If you answered 'yes' to question A-2, then answer the following question.
>
> A-3. Considering all the evidence in this case, have the plaintiffs convinced you that the company and the union intended that retirees under the 1975-78 agreement would receive welfare benefits for the rest of their lives?
>
> Yes ——
>
> No ——"

The form requested the jury to answer the same three questions for persons who retired within the effective dates of the four subsequent CBAs. After only twenty minutes of deliberation the jury answered all the questions in the affirmative, finding that the union and the company had intended to enter into binding agreements to provide lifetime benefits to retired employees under each of the five Collective Bargaining Agreements.

Following tht jury verdict, the trial court entered judgment for the plaintiffs. The court noted that the jury's role in resolving the first of its verdict questions regarding whether the Collective Bargaining Agreements were ambiguous involved a question of law and was "advisory" only. But, the judge stated his concurrence with the jury's result and pointed out that he had independently reached the same resolution regarding contractual ambiguity in his order denying partial summary judgment. The judge went on to state that he was "in complete agreement with the jury's assessment of the case on every issue it decided." Thus, the court found United Dominion and PST liable for lifetime benefits under the Collective Bargaining Agreements and held New Pressed Steel liable for breach of fiduciary responsibility under ERISA Section 404(a)(1). The court ruled that the following injunction, which the plaintiffs proposed, provided appropriate relief:

> "1. The defendants must reinstate medical benefit coverages for retirees which were in effect immediately prior to July 31, 1988, (including Medicare Part B reimbursement) to all hourly retirees of the PST plan in West Allis, Wisconsin, who worked there in November 1975 or after, as well as such retirees' spouses and eligible dependents.
>
> 2. The defendants must provide life insurance with a death benefit of $2,000 for all hourly retirees of the PST plan in West Allis, Wisconsin, who

worked there in 1975 or after, and, for disability retirees, a death benefit equal to their last level of death benefit as active employees until they reach the age of sixty-five (65), at which time the death benefit shall reduce to $2,000.

3. The cost of providing the above benefits shall be borne entirely by the defendants, jointly and severally, except that retirees who retired after August 1, 1986, shall contribute, for medical benefits only, the excess, if any, between the monthly premium cost of their selected HMO coverage and the monthly premium cost of the comprehensive 80/20 health plan.

4. The medical and life benefit coverages and Medicare Part B reimbursement shall be continued throughout the life of each retiree."

The judge then referred the case to a magistrate for the purposes of calculating damages incurred as a result of New Pressed Steel's refusal to pay retiree life and health benefits subsequent to July 31, 1988.

III. ISSUES PRESENTED

This appeal raises the following issues: (1) Whether the trial court erroneously permitted a jury trial; (2) Whether the district court erred in finding that United Dominion Industries and PST, Inc. violated obligations under the Collective Bargaining Agreements with the United Steel Workers when they terminated health and life insurance benefits at the expiration of the 1986-88 CBA on July 31, 1988 and when they charged pre-1986 retirees for the expenses of HMO coverage under the 1986-88 Collective Bargaining Agreement; and (3) Whether the district court improperly determined that New Pressed Steel violated a fiduciary duty under Section 404(a)(1) of ERISA in failing to provide insurance ben-

efits to retirees for life and in charging pre-1986 retirees the expenses of HMO coverage between 1986 and 1988.[7]

IV. RIGHT TO JURY TRIAL

The defendants assert that the trial court erroneously granted the plaintiffs a jury trial on their claim under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) and Sections 502(a)(1) and (a)(3) of ERISA, 29 U.S.C. § 1132(a)(1) and (a)(3).[8] When determining whether the Seventh Amendment to the United States Constitution requires a jury trial of a particular issue, the United States Supreme Court has mandated that the following analysis be undertaken:

> " 'First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.' *Tull v. United States*, 481 U.S. 412, 417-18, 107 S.Ct. 1831, 1835, 95 L.Ed.2d 365 (1987) (citations omitted). The second stage of this analysis is more important than the first. *Id.* at 421, 107 S.Ct., at 1837."

Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989). Count one of the

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[7] The defendants raise additional claims asserting that the trial court impermissibly submitted the question of contractual ambiguity for an "advisory" jury verdict, provided improper instructions and verdict forms to the jury and issued defective findings of fact and conclusions of law regarding the liability of the defendants for lifetime retiree insurance benefits and for expenses incurred by pre-1986 retirees. We need not reach these issues in light of our holding, *infra* that the defendants are not liable for lifetime benefits for retirees or for insurance expenses incurred by pre-1986 retirees.

[8] The trial court did not submit the plaintiffs' fiduciary duty claims under Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) to the jury.

plaintiffs' second amended complaint requested monetary damages under Section 301 of the LMRA for breach of contract. As the Supreme Court noted in its analysis of 18th-century actions in *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 1347, 108 L.Ed.2d 519 (1990), a claim under Section 301 that the employer breached a Collective Bargaining Agreement "is comparable to a breach of contract claim—a legal issue." In *Terry*, however, the only relief sought was compensatory damages, while the plaintiffs in the instant case are primarily seeking injunctive relief, a remedy traditionally available from courts of equity alone. The claim for monetary damages could be characterized as incidental to the request for an injunction. It is well settled that when legal and equitable relief are separately authorized by statute, and the "legal claim is joined with [the] equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." *Tull v. United States*, 481 U.S. 412, 424-425, 107 S.Ct. 1831, 1839, 95 L.Ed.2d 365 (1987) (quoting *Curtis v. Loether*, 415 U.S. 189, 196 n. 11, 94 S.Ct. 1005, 1009 n. 11, 39 L.Ed.2d 260 (1974)). Because the plaintiffs instituted a legal claim for breach of contract and sought legal relief in the form of compensatory damages pursuant to Section 301 of the LMRA, in addition to injunctive relief pursuant to Sections 404(a)(1), 502(a)(1)(B) and 502(a)(3) of ERISA, the Seventh Amendment provided them with a right to a jury trial. Thus, the trial court acted properly in ordering a jury trial on the issue of whether the defendants breached the CBA in violation of Section 301(a) of the Labor Management Relations Act and Sections 502(a)(1) and (a)(3) of ERISA.

V. RETIREES' CONTRACTUAL ENTITLEMENT TO LIFETIME INSURANCE BENEFITS AND PRE-1986 RETIREES' RIGHT TO FULLY PAID HMO BENEFITS

The central issue in this case is whether Collective Bargaining Agreements and plan documents entitled retirees to welfare benefits for the rest of their lives and pre-1986 retirees to fully paid HMO benefits. The trial court accepted the jury's verdict that the parties intended to contract for lifetime welfare benefits for persons who retired during the terms of each of the five CBAs between PST and the United Steelworkers and determined that retirees were entitled to these benefits.

In *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602-03 (7th Cir.1989), we held that ERISA did not establish a statutory right of vesting for welfare benefits. But, we observed that employers and unions may choose to enter agreements for welfare benefits to vest:

> "[P]arties are free to subject . . . welfare benefits to vesting requirements not provided by ERISA, or they may reserve the power to terminate such plans. As the Sixth Circuit has stated in *Hansen v. White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir.1986), 'the parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated.' *Id.* at 1193."

Id. at 603. We have further recognized the legal proposition that, in the absence of an agreement to the contrary, a company is not obligated to continue retiree welfare benefits after the expiration of the contract:

> "The entitlements established by collective bargaining agreements do not survive their expiration or modification. So if, for example, the 1982-85 agreement had established a plan under which Jewel provided health benefits for its employees and retirees, the

> Union and Jewel would had been free to abolish those benefits for subsequent periods, even though the Union does not represent retirees. If the Union and Jewel had reached an impasse, Jewel would have been free to put into place its last proposal, which might not have included health benefits. *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988); *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311 (7th Cir.1986); *cf. DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988) (ERISA does not alter the rule of labor law in this respect). That the retirees had worked in earlier years in the expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement any subjective expectation they may have had is not enforceable."

Merk v. Jewel Cos., Inc., 848 F.2d 761, 763 (7th Cir.), *cert. denied*, 488 U.S. 956, 109 S.Ct. 393, 102 L.Ed.2d 382 (1988). Furthermore, as we noted in *Ryan*, the question of whether Collective Bargaining Agreements and plan documents contain agreements to vest entitlement to lifetime retirement benefits should be determined without reference to extrinsic evidence if the terms of the writings involved are unambiguous:

> "If a district court determines that the pertinent provisions of the contract are unambiguous, it need not consider extrinsic evidence. At that point, the district court should proceed to declare the meaning of those provisions, an interpretation which this court reviews *de novo* as a question of law."

Ryan, 877 F.2d at 602. *See also U.S. Fire Ins. Co. v. Pressed Steel Tank Co., Inc.*, 852 F.2d 313, 316 (7th Cir.1988) ("If the contract is unambiguous, the court is to construe it as a matter of law."); *Jackman v. WMAC Invest. Corp.*, 809 F.2d 377, 380 (7th Cir.1987) ("In Wisconsin . . . parol evidence is not admissible to

vary the terms of a complete and unambiguous contract . . . .").

The initial 1975-78 CBA between PST and the Steel Workers in conjunction with the Insurance Booklets[9] effective during the term of this agreement provided only that retired employees would receive insurance coverage and that company contributions would be made toward this insurance. (*See supra* at 2-4). The contract documents contained no language that established a vested right for persons who were retired during the term of the agreement to enjoy welfare benefits after the termination of the Collective Bargaining Agreement. Similarly, neither the 1978-81 Collective Bargaining Agreement, the 1981-84 Collective Bargaining Agreement nor the Insurance Booklets issued during the terms of these contracts contained any language supporting retirees' entitlement to welfare benefits after the expiration of the CBAs involved. Rather, the text of the 1981-84 contract and the Insurance Booklets incorporated by reference into both the 1978-81 and 1981-84 contracts merely provided for employer contributions to insurance benefits for retirees during the effective periods of the respective Collective Bargaining Agreements. Nothing was stated concerning any benefits retirees would receive when the Collective Bargaining Agreements expired. The 1984-86 and 1986-88 CBAs and the Group benefits booklets incorporated therein by reference provide even less support for a right to benefits following the expiration of the Collective Bargaining Agreements. The 1984-86 Collective Bargaining Agreement, in contrast to the 1981-84 CBA, included no language specifically referring to retiree insurance benefits, even though it effected a thorough restructuring of the company's welfare benefits program. Further, the Group benefits booklet issued

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[9] Since the Insurance Booklets as well as the subsequent Group benefits booklets were explicitly incorporated into each of the collective bargaining agreements, they constitute part of the contract rather than extrinsic evidence.

during the effective period of the 1984-86 contracts specifically provided that insurance benefits would end upon either the terminaton of the employer's welfare benefit plan or the expiration of the Collective Bargaining Agreement. In the final 1986-88 contract, any argument for retiree benefits following the expiration of the Collective Bargaining Agreement was severely undercut with language that provided:

> "Group medical and life coverages and Medicare Part B reimbursement for (a) current retirees and (b) employees who retire during the current contract shall be continued *during the term of this Agreement*."

(Emphasis added). Furthermore, the Group benefits booklet issued during the term of the final CBA continued the language added to the April 1985 booklet that explicitly provided that retiree insurance coverage would terminate upon the earlier of the plan's termination or the expiration of the governing Collective Bargaining Agreement. In short, our examination of the relevant Collective Bargaining Agreements and plan documents incorporated therein by reference reveals that they are void of any language that would provide the basis for finding an ambiguity in regard to a vestment of lifetime welfare benefits to employees who retired under the terms of any of the five Collective Bargaining Agreements. Thus, under our holdings in *Ryan* and *Merk*, set forth above, the retirees possessed no vested interest in welfare benefits, and the entitlements did not survive the expiration of the CBAs.

The district court held that the Collective Bargaining Agreements and plan documents were ambiguous, as they referred to continued coverage for retirees, which could be interpreted to mean that the company "would provide benefits for the life of those who retire during the term of the contract. . . ." Thus, the trial court held that resort to extrinsic evidence was necessary to resolve the issue of the plaintiffs' entitlement to lifetime welfare ben-

efits. We disagree. The default rule in this Circuit is that "entitlements established by collective bargaining agreements do not survive their expiration or modification." *Merk*, 848 F.2d at 763. Thus, it requires more than a statement in a CBA that welfare benefits "will continue" to create an ambiguity about vesting, for the logical interpretation under our rule is that benefits "will continue" for the duration of the contract. Moreover, the Collective Bargaining Agreements and plan documents at issue are either silent on the question of whether a right to lifetime benefits should vest or appear to explicitly prohibit such vesting (i.e., the 1985 and 1986 Insurance Booklets and the 1986-88 Collective Bargaining Agreement). The mere silence of Collective Bargaining Agreements and plan documents concerning the vestment of welfare benefits fails to give rise to an ambiguity. Rather, this silence and the explicit repudiation of any possible basis for a lifetime benefits claim in the 1986-88 Collective Bargaining Agreement as well as the 1985 and 1986 Group benefits booklets referenced therein demonstrate that the signatories to the contract did not intend that a lifetime right to welfare benefits would vest in retirees. Because there was no agreement to continue welfare benefits for retirees on a lifetime basis and because there was no ambiguity warranting the admission of extrinsic evidence on this issue, we disagree with the trial court's conclusion that United Dominion Industries and PST were contractually liable for lifetime insurance benefits for retirees and that the termination of benefits violated Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) and Sections 502(a)(1) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (a)(3).

The same analysis also leads us to disagree with the trial court's finding that United Dominion and PST violated 29 U.S.C. § 185(a) and 29 U.S.C. §§ 502(a)(1) and (a)(3) when, during the term of the 1986-88 Collective Bargaining Agreement, they required retirees

electing HMO coverage to pay the cost difference between an HMO health insurance coverage plan and conventional health insurance coverage. Because there was never a vested right for retirees to receive any form of welfare benefits, it follows that there was no vested right for them to receive a specific type of health insurance coverage at a particular cost. Thus, requiring pre-1986 retirees to pay the difference between HMO and conventional insurance coverage in accordance with the 1986-88 CBA and plan documents was permissible under both Section 301(a) of the Labor Management Relations Act and Sections 502(a)(1) and (a)(3) of ERISA.

VI. FIDUCIARY DUTY TO PROVIDE RETIREES WITH LIFETIME WELFARE BENEFITS

The trial court also found that New Pressed Steel violated Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), when as a successor fiduciary, it "had actual knowledge of the decision to terminate benefits. [Thus, New Pressed Steel] is liable to the plaintiffs." [10] While we have not previously addressed the precise issue of whether an employer administering a retiree welfare plan has a fiduciary duty to continue providing health benefits after the expiration of the contract requiring such benefits, the Sixth Circuit has made clear than an employer's choice to reduce welfare benefits will not give rise to a claim for breach of fiduciary duty under ERISA:

> "There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company

[10] As discussed previously, the trial court found that United Dominion Industries and PST breached a contractual promise to pay lifetime benefits to retirees in violation of Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) and Sections 502(a)(1) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (a)(3). The trial court did not reach the question of whether these two defendants' conduct also violated Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1).

acts as a fiduciary in performing the first task, but not the second. As this court, speaking through Judge Celebrezze, declared in *Moore v. Reynolds Metals Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir. 1984),

> '[n]either Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation.'

Congress . . . 'has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers' to amend plan provisions regarding unfunded contingent benefits. Such changes . . . 'are not to be reviewed by fiduciary standards.'

". . . National Life had no fiduciary duty to establish any medical insurance plan, much less one that could never be amended without the approval of those to whom it applied. It is hard to see how the company's express reservation of a right to amend the plan can be said to constitute 'overreaching' when a prudent employer, mindful of the possibility that medical costs might skyrocket, could well have decided, if given the slightest reason to suppose the future amendments to the medical insurance coverage could be invalidated under ERISA, not to provide such coverage at all, or to impose the most stringent limits on any coverage provided.

"The case law, in any event, makes it clear that *when an employer decides to establish, amend, or terminate a benefits plan*, as opposed to managing any assets of the plan and administering the plan in ac-

> cordance with its terms, *its actions are not to be judged by fiduciary standards.* 'ERISA's concern is with the elements of a plan and its administration after it has been established rather than to mandate the creation of a program. ERISA does not require an employer to establish a hospitalization plan nor continue it indefinitely.' "

Musto v. American General Corp., 861 F.2d 897, 911-12 (6th Cir.1988) (quoting *Viggiano v. Shenago China Division of Anchor Hocking*, 750 F.2d 276, 279 (3d Cir. 1984)) (citations omitted) (emphasis added). *See also Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir.1988) ("[A]n employer does not owe its employees a fiduciary duty when it amends or abolishes a severance benefit plan.").

The plaintiffs' attempt to distinguish *Musto* is based on their position that United Dominion Industries and PST had a contractual duty to provide lifetime benefits to all employees and to fully fund the HMO benefits of pre-1986 retirees, which in turn gave rise to a duty on the part of New Pressed Steel, in its alleged capacity as a successor fiduciary, to honor these promises.[11] As we held in Section V, *supra*, the parties' Collective Bargaining Agreements and plan documents did not require either United Dominion or PST to provide retirees with lifetime benefits or to furnish fully-paid HMO benefits for pre-1986 retirees. Thus, the reasoning of *Musto* that an employer's decision to amend an unfunded plan provision is "not to be reviewed by fiduciary standards," *id.* at 911, supports a holding that Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), did not impose any fiduciary duty upon New Pressed Steel to provide lifetime benefits

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[11] In light of our holding, *supra*, that there is no fiduciary duty to provide lifetime benefits or to continue fully-paid HMO benefits for pre-1986 retirees under Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), we need not address the question of whether New Pressed Steel was a fiduciary for purposes of this section of ERISA.

for all retirees or to continue fully-paid HMO benefits for pre-1986 retirees. We agree that "when an employer decides to establish, amend, or terminate a benefits plan . . . its actions are not to be judged by fiduciary standards." *Musto*, 861 F.2d at 912.

VII. CONCLUSION

We certainly are sympathetic to the plight of retirees who may have erroneously thought that the company would pay the cost of their life and health insurance throughout their lifetimes. But we are not permitted to allow our sympathies and desires to vitiate clear principles of contract and labor law, and in particular, we refuse to amend the clear terms of the health and welfare benefits contained in the Collective Bargaining Agreements. Since ERISA does not provide for vesting of welfare benefits, vestment of lifetime benefits must arise from the Collective Bargaining Agreements. The unambiguous terms of the contracts at issue fail to provide for vesting. Thus, we hold that there was no obligation under the Collective Bargaining Agreements, plan documents or ERISA fiduciary responsibilities for the defendants to provide lifetime welfare benefits to the plaintiffs or to continue fully-paid HMO benefits for pre-1986 retirees. The judgment of the district court is

REVERSED.

WILL, Senior District Judge, concurring.

I concur in Judge Coffey's analysis and opinion and, particularly, in his expression of sympathy for retirees who have received and relied upon company financed life and health insurance plans for many years and who then suddenly find themselves unprotected. This case is not an isolated example and is one of the reasons for the growing demand that some form of national health plan be adopted so that retirees and other persons will be able to afford

and secure the medical services they need. Given the fact that retirees require progressively more medical treatment as they age and that there will continue to be more of them, it is particularly important that some comprehensive long-term plan other than the present diminishing Medicare program be adopted for their protection.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 87-C-1353

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON, on behalf of themselves and a class of all persons similarly situated,

Plaintiffs,

v.

AMCA INTERNATIONAL, a foreign corporation, PST, INC., a foreign corporation, and PRESSED STEEL TANK CORPORATION, INC., a foreign corporation,

Defendants.

ORDER

[Filed Sep. 10, 1990]

This is an action for injunctive relief and damages brought by retirees of a company, known by various names under various ownership, the defendants here.

The second amended complaint consists of four counts and seeks legal and equitable relief. Count I is based on section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Count II is based on a willful violation of an employee benefits plan, in violation of sections 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1002(1), (3) and 1132 (ERISA). Count III alleges a breach of fiduciary duty based on section 404 of ERICA, 29 U.S.C. § 1104. Count IV is a claim for detrimental reliance.

By order dated December 21, 1988, I certified a class under rule 23(b)(2) of the Federal Rules of Civil Procedure, defined as "all hourly retirees of the PST plant in West Allis, Wisconsin, who worked there in November 1975 or after, as well as such retirees' spouses and eligible dependents or estates."

In an order filed May 9, 1989, I denied a motion brought by the plaintiffs for partial summary judgment. Plaintiffs had sought an order that the defendants are responsible for providing lifetime health and life insurance benefits to former employees (and eligible family members) who retired from PST before August 1, 1986. Although I stated that the collective bargaining agreements on which the claims were based were ambiguous, I found that the collective bargaining agreements, the summary plans, the booklets, and the deposition testimony did not warrant the granting of summary judgment. It was left for trial for plaintiffs to show that the defendants and the Steelworkers (the union representing the plaintiffs) intended that the retiree welfare benefits were lifetime benefits.

The May 9, 1989, decision dealt with other thorny issues, including whether the trial should be a jury trial or a bench trial. The plaintiffs sought both legal and equitable relief. I determined that the plaintiffs could have a jury hear their contract claim that the parties intended for retiree welfare benefits to be lifetime benefits. The request for injunctive relief would be left for my determination.

Trial was held on December 4, 5, 6, 7, and 11, 1989, as to liability only. The jury was asked three questions as to each of five collective bargaining agreements. Even though the issue of ambiguity could be said to have been resolved, and even though it is a question of law for the court, the first question put to the jury was that issue: Were the contracts ambiguous as to "how long welfare benefits must be paid to retirees?" The second asked whether it was necessary to go outside the agreement to "interpret (not vary) what the intent of the com-

pany and the union was as to the duration of retirees' welfare benefits?" Finally, the jury was asked whether the plaintiffs had convinced it "that the company and the union intended that retirees under the [agreements] would receive welfare benefits for the rest of their lives?" The jury answered "yes" to each question.

Following the trial, I was hopeful that the parties would be able to work out a resolution of the damage issues. However, that was not to be. Several motions have been filed on the remaining issues (or, in some instances, already decided issues) in this case.

Plaintiffs first moved for the entry of judgment against PST, Inc. for injunctive relief on the claim pursuant to section 301. That motion has been withdrawn and has been replaced with a motion for prelminary or permanent injunctive relief. The defendants, too, have filed a motion for the entry of judgment—in their favor—and have submitted proposed findings of fact and conclusions of law. Plaintiffs have moved for supplementary interrogatory answers and to have the case referred to a magistrate for a determination of damages.

The most remarkable motion is the defendants' motion for the entry of judgment in their favor. One of their proposed findings is in part as follows:

> On the fifth day of trial, I converted the jury to an advisory one.

One of the proposed conclusions is as follows:

> [T]he Court is not bound by the jury verdict, and will treat this case as having been tried to the Court with an advisory jury—whose advice the Court rejects. The question of whether the CBAs are ambiguous concerning the duration of welfare benefits, which the Court submitted to the jury in an advisory capacity, is an issue of law rather than of fact—and therefore was not triable to the jury, even in an advisory capacity. On the other questions sub-

> mitted to the jury, the parties have expressed disagreement as to their understanding of the jury's capacity. However, as to those questions, the rapidity of the jury's decision and its total disregard of the documentary evidence which, under ERISA, must control this case, convince the Court that the jury verdict was purely the product of prejudice, and not of a rational consideration of the trial evidence. The jury's dereliction of its duty in this case sharply illustrates the correctness of the Circuit Court's concerns in *Wardle* about the unworkability of jury trials in ERISA cases. The Court would therefore grant a new trial—*if* a jury trial were permissible in a case like this. Under *Wardle* and *Bugher* it is not, so I simply reject the jury's advisory verdict . . . .

For the most part the proposals are preposterous. I reject them. And they do nothing to inspire my confidence as to the accuracy of other defense proposed findings and conclusions, even were I inclined to turn this case on its head.

Defendants are, however, right on one point. The jury question regarding ambiguity is "advisory." The issue of ambiguity had all but been decided in the May 9, 1989, order. It was submitted to the jury to put the other issues in context. I stated during trial:

> The plaintiff and the defendant have both asked me to decide the question of whether or not the individual collective bargaining agreements are ambiguous. And although I don't necessarily disagree with the position that it is a question of law, it should be decided by the court in the context of this case, I'm going to submit it to the jury. And the jury's verdict on the point may be viewed as merely advisory but I think it sets up the verdict better to have the jury pass on the question of ambiguity.

On that one issue then, the jury's verdict was advisory. However, on the other issues it was not.

On the issue of ambiguity, I hereby INCORPORATE into this order my discussion of the issue in the May 9, 1989, decision. I find that the agreements are ambiguous.

Furthermore, I am in complete agreement with the jury's assessment of the case on every issue it decided. As I have said several times, the contracts are ambiguous; furthermore, it is necessary to go outside the agreements to find the intent of the parties; and, most importantly, the parties clearly intended that the benefits would be lifetime benefits. More on this last issue later. Right now it is sufficient to say that the defendants' motion for the entry of judgment in its favor is DENIED.

Because I am entirely in agreement with the jury's assessment of this case, it is clear that an injunction, as requested by the plaintiffs, should issue. They ask for an injunction as follows:

> 1. That the Defendants reinstate medical benefit coverages for retirees which were in effect immediately prior to July 31, 1988 (including Medicare Part B reimbursement) to all hourly retirees of the PST plant in West Allis, Wisconsin who worked there in November, 1975 or after, as well as such retirees' spouses and eligible dependents.
>
> 2. That Defendants provide life insurance with a death benefit of $2,000.00 for all hourly retirees of the PST plant in West Allis, Wisconsin, who worked there in 1975 or after, and for disability retirees, a death benefit equal to their last level of death benefit as active employees until they reached the age of sixty-five (65), at which time the death benefit shall reduce to $2,000.00.
>
> 3. That the cost of providing the above benefits shall be borne entirely by the Defendants, jointly and severally, except that retirees who retired after 8/1/86 shall contribute, for medical benefits only,

the excess, if any, between the monthly premium cost of their selected HMO coverage and the monthly premium cost of the comprehensive 80 20 health plan.

4. That the said medical and life benefit coverages and Medicare Part B reimbursements shall be continued throughout the life of each retiree.

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, the following, as well as relevant facts stated above and in other decisions entered in this case, are the specific findings and conclusions on which I base the issuance of an injunction.

The individual plaintiffs in this case are retired hourly employees of PST, Inc. in West Allis, Wisconsin. Plaintiff Norman Senn retired under the 1975 collective bargaining agreement; plaintiff Paul Gilmore under the 1978 CBA; Clemens S. Kien under the 1981 CBA; John Gross under the 1984 CBA; and Jack Hudson under the 1986 CBA.

The company here under various names and with various owners has been in operation in West Allis since 1902. Prior to January 1987, PST was known as Pressed Steel Tank Co., Inc. In 1982 AMCA International Corp. acquired PST as a wholly owned subsidiary. In January 1987 PST/AMCA sold the facility and the name "Pressed Steel Tank" to Fluid Technology, Inc. Fluid Technology changed its name to Pressed Steel Tank Company, Inc.

In its answer to the second amended complaint Pressed Steel Tank admits that it owed a fiduciary duty to the plaintiffs. It denies being a successor fiduciary. However, the evidence indicates that it was. The administration of the benefit plans continued after the sale as it had before, with Pressed Steel Tank taking over the administration. George Finch, president of the new company, had actual knowledge of the decision to terminate benefits. Pressed Steel Tank Company, Inc. is liable to the plaintiffs.

The pertinent sections of the CBAs are set forth in the May 9, 1989, decision, which is already playing a prominent part in this decision. I will once again incorporate into this decision the relevant pages from that decision.

Having listened to testimony about what the parties to the agreements intended as far as welfare benefits are concerned, I am convinced that the credible testimony is that everyone assumed that the benefits were lifetime benefits. The inference I draw from the testimony of the plaintiffs, the union people, and, in fact, some of the company people, is that in the old days, before multinational corporations were involved, Pressed Steel was a paternalistic company. And it clearly had a loyal work force. Plaintiff Norman Senn and Clemens Kien worked for the company for at least 40 years each; Paul Gilmore worked for the company more than 34 years; John Gross for 44 years; and Jack Hudson for 27 years.

I also infer from the testimony that the premise on which contract negotiators worked was so well-understood that it did not need to be explicitly stated. That premise was that the welfare benefits were lifetime benefits. The benefits continued, as everyone assumed they would, until January 1987, when the retirees were required to pay certain reimbursements, and July 1988, when the company terminated all welfare benefits.

The testimony of the witnesses who have been involved in negotiating or administering the contracts shows that the underlying premise was that the benefits, both health and life insurance, were lifetime benefits and that negotiated improvements in benefits were to be applied to previous retirees. Wilbert Vander Hayden has been a staff representative in Milwaukee for the United Steel Workers International Union since November 1, 1974. Before that time he held various positions in local unions. He participated in the negotiations for each of the labor contracts at issue here.

He explained that negotiations on behalf of past retirees is permissive; that is, the company does not have to include the retirees in bargaining. If the company is willing, a union can obtain for past retirees an increase in benefits, but cannot negotiate away benefits already in place. As to retirees, it was his understanding that the benefits provided in the contract were lifetime benefits. That understanding was buttressed by the events surrounding the negotiations for the 1986 contract. The company proposed eliminating benefits for persons retiring under the new contract. When word of this proposal got out at the plant, a group of retirees went to the company to retire under the existing contract so as to have welfare benefits. The company granted the retirees a 1-month leeway period during which they could retire with the benefits.

James Otto, the company's personnel manager, also testified to the events surounding the negotiations for the 1986 contract. His notes from a management meeting show that the discussion involved putting in a "window" to allow persons who wanted to retire to have their benefits for life just as did those who retired under all the earlier contracts.

William Loesch, the vice-president of finance, was analyzing the result of the window: how much would the lifetime benefits cost the company. He projected costs as to specificially named employees who were considering retiring during the window period. The costs were calculated on the basis of welfare benefits for life.

LeRoy Silampa was the manager of industrial relations for the company. He was the chief bargaining spokesman except that, in the 1986 negotiations, Mr. George Matkov also played a significant role. In his notes, Mr. Silampa wrote: "Still the enticement, the enticement of lifetime company paid health care is a strong inducement." The evidence shows that even George Finch, the president of the New Pressed Steel, had personal

knowledge that the benefit plan was intended to last for the life of each retiree.

On the basis of the overwhelming evidence regarding intent, I conclude that the health and life insurance benefits were intended to be lifetime benefits.

Defendants choose to rely on what they call a "Ryan-Alpha Portland" rule. The "rule" is derived from defendants' interpretation of two cases: *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989), and *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988). In defendants' view the "rule" is that

> absent an express promise of vesting in the written instrument establishing a benefit plan, welfare benefits do *not* vest. Bluntly put, despite the jury's "advice" to the Court, the *absence* of a promise of vesting or of an express durational provision is *not* an "ambiguity"; it is simply the *absence of a promise*—which is *no promise at all.* [Excessive underlining in the original.]

Brief of defendants, filed Feb. 9, 1990, p. 11.

The *Ryan* case is from the court of appeals for this circuit. It falls far short of being as emphatic as defendants would have it. The court in *Ryan* stated the unexceptional proposition that summary judgment should be entered "only if the pertinent provisions of the contractual documents are unambiguous." If those provisions are unambiguous, then there is no need to consider extrinsic evidence. At 602. *Ryan* and *Alpha Portland* (which I cited in the May 9, 1989, order) state the equally unexceptional proposition that welfare benefits are explicitly exempted from ERISA's vesting requirements. No one says they aren't.

What *Ryan* really stands for is exactly what happened in this case. The court stated:

> Therefore, the efficacy of appellants' claim under ERISA turns solely upon the terms of the written instruments governing the plan.

At 603. If the plan is unambiguous and allows for termination of benefits, as in *Ryan*, then that is the end of the discussion. If not, however, nothing in *Ryan* precludes the use of extrinsic evidence.

The plaintiffs to this action have prevailed on the merits of the action. As retirees with very low pension benefits, they have the balance of equities in their favor. The harm to the retirees by the loss of their health benefits is irreparable in terms of anxiety and fear alone. Many are of advanced age, and a future award of damages may unfortunately not be of consolation to them. The public interest is also served by an injunction in this case. Promises made through collective bargaining are to be protected.

I also find that the injunction as proposed by the plaintiffs conforms to the appropriate relief in this case. It will be issued as proposed.

Two minor matters must be resolved. Plaintiffs have requested an order requiring the defendants to supplement their responses to the plaintiffs' first set of interrogatories, interrogatories one and two. For the reasons stated in the plaintiffs' affidavits, that request is GRANTED.

Plaintiffs also request that I refer this matter to a magistrate for a calculation of past damages. The request is GRANTED. The case is referred to Magistrate Robert Bittner for that purpose.

SO ORDERED at Milwaukee, Wisconsin, this 10 day of September, 1990.

BY THE COURT:

/s/ Terence T. Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 87-C-1353

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON, on behalf of themselves and a class of all persons similarly situated,

Plaintiffs,

v.

AMCA INTERNATIONAL, a foreign corporation, PST, INC., a foreign corporation, and PRESSED STEEL TANK CORPORATION, INC., a foreign corporation,

Defendants.

INJUNCTION

[Filed Sep. 10, 1990]

For the reasons stated in the September 7, 1990, decision, the following injunction is issued.

1. The defendants must reinstate medical benefit coverages for retirees which were in effect immediately prior to July 31, 1988, (including Medicare Part B reimbursement) to all hourly retirees of the PST plant in West Allis, Wisconsin, who worked there in November 1975 or after, as well as such retirees' spouses and eligible dependents.

2. The defendants must provide life insurance with a death benefit of $2,000 for all hourly retirees of the PST plant in West Allis, Wisconsin, who worked there in 1975 or after, and, for disability retirees, a death benefit equal

to their last level of death benefit as active employees until they reach the age of sixty-five (65), at which time the death benefit shall reduce to $2,000.

3. The cost of providing the above benefits shall be borne entirely by the defendants, jointly and severally, except that retirees who retired after August 1, 1986, shall contribute, for medical benefits only, the excess, if any, between the monthly premium cost of their selected HMO coverage and the monthly premium cost of the comprehensive 80/20 health plan.

4. The medical and life benefit coverages and Medicare Part B reimbursement shall be continued throughout the life of each retiree.

SO ORDERED at Milwaukee, Wisconsin, this 10 day of September, 1990.

BY THE COURT:

/s/ Terence T. Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 87-C-1353

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON, on behalf of themselves and a class of all persons similarly situated,

Plaintiffs,

v.

AMCA INTERNATIONAL, a foreign corporation, PST, INC., a foreign corporaton, and PRESSED STEEL TANK CORPORATION, INC., a foreign corporation,

Defendants.

DECISION AND ORDER

[Filed May 9, 1989]

On December 28, 1988, seven days after I certified this case as a class action for the second time, the plaintiffs moved for partial summary judgment. They want me to declare that the defendants—the past and present owners of the PST plant in West Allis, Wisconsin—are responsible for providing lifetime health and life insurance benefits to former employees (and the eligible family members of former employees) who retired from PST before August 1, 1986.

According to the plaintiffs, the defendants agreed to fund lifetime welfare benefits for retirees in a series of labor contracts with the United Steelworkers of America. The plaintiffs say the contracts imposed this obligation at least with regard to persons who retired before the 1986-

88 contract went into effect. That document contained different language than the earlier ones, so the plaintiffs are not now seeking relief for those who retired during its term.

PST stopped paying for retirees' welfare benefits (but continued their pensions) on July 31, 1988, the expiration date of the 1986-88 contract. The defendants argue that none of the collective bargaining agreements contemplated lifetime welfare benefits for retirees. Instead, they say, the contracts compelled PST's owners to provide such benefits only for the duration of the collective bargaining agreements themselves.

Below, I will deny the plaintiffs' motion. The pre-1986 contracts are sufficiently ambiguous that the parties' intentions cannot be decided on summary judgment.

FACTS

The plaintiff class consists of "all hourly retirees of the PST plant in West Allis, Wisconsin, who worked there in November 1975 or after, as well as such retirees' spouses and eligible dependents or estates." The retirees manufactured pressed steel tanks and were represented by the Steelworkers union. Between 1975 and 1988, the union and the defendants (hereinafter "PST") entered into five collective bargaining agreements (hereinafter "CBAs"). Pertinent provisions of these contracts are excerpted here:

1975-78 CBA

24.1 Insurance

> a. The Company shall select the insurance carrier(s) to provide the benefits provided in the Insurance Plans and agrees to continue the plans as described in the Insurance booklet dated June 12, 1973 entitled "Insurance Plan for Employees and Their Dependents Covering Hourly Employees—Life Insurance, Accident and Sickness, Hospital Surgical Expense—Major Medical Expense" and as revised.

b. The Company will continue for retired employees, the WPS Medicare Supplemental Plan premium contribution of $3.90 per month and $4.00 Medicare "B" refund.

c. The spouse (under the age of 65) of a deceased employee may continue participation in the active group Medical Insurance Plan for one year following the death of the employee by making premium payments to the Company.

The contract contained a "Scope of Agreement" provision:

> This Agreement and the supplemental letter agreements executed concurrently herewith constitute the sole and entire Agreement between the parties and supersedes all prior Agreements, oral or written, and expresses all the obligations of or restrictions imposed on the respective parties during its term. Such Agreement can only be amended by a signed agreement executed by the parties. Such agreement shall be published and made available to employees.

The insurance booklet referenced by section 24.1a of the CBA had this to say regarding retirement benefits:

> Termination of Employment
>
> If not previously terminated, all coverage terminates at the end of the month in which employment terminates and seniority is lost (see "Retirement" and "Conversion" below).
>
> . . . .
>
> Retirement
>
> On retirement under the Normal, Disability, or Early Retirement provisions of the Pressed Steel Tank Hourly Pension Plan, at the end of the calendar month in which employment terminates, Accident and Sick-

ness coverage terminates and Term Life Insurance coverage reduces to $1,000 (except that if the employee is eligible for a Disability Retirement Benefit his Term Life Insurance coverage will be continued at its present level (usually $7,500) until the end of the calendar month in which he attains age 65, at which time the coverage reduces to $1,000[)]. Special Hospital-Surgical Expense coverage is available to the retired employee or the retired employee and his dependents if he makes the required quarterly contributions in advance for the coverage desired.

1978-81 CBA

24.1 Insurance

a. The Company shall select the insurance carrier(s) to provide the benefits provided in the Insurance Plans and agrees to continue the plans as described in the Insurance Booklet dated December 12, 1976 entitled "Insurance Plans for Hourly Employees and Their Dependents, Covering Life Insurance, Accident and Sickness, Hospital Surgical Expense—Major Medical Expense", dental, drugs and as revised.

b. The spouse (under the age of 65) of a deceased employee may continue participation in the active group Medical Insurance Plan for one year following the death of the employee by making premium payments to the Company.

The 1976 insurance booklet referenced by section 24.1a explained the following with regard to retirees:

Termination of Employment

If not previously terminated, all coverage terminates at the end of the month in which employment terminates and seniority is lost (see "Retirement" and "Conversion" below).

. . . .

Retirement

On retirement under the Normal, Disability, or Early Retirement provisions of the Pressed Steel Tank Hourly Pension Plan, at the end of the calendar month in which employment terminates, Accident and Sickness coverage terminates and Term Life Insurance coverage reduces to $1,000 (except that if the employee is eligible for a Disability Retirement Benefit his Term Life Insurance coverage will be continued at its present level, usually $7,500 until the end of the calendar month in which he attains age 65, at which time the coverage reduces to $1,000). Hospital-Surgical coverage for disability retirees is continued as provided for active employees described under enrollment requirements. Special Hospital-Surgical Expense coverage is available to the retired employee or the retired employee and his dependents if he makes the required quarterly contributions in advance for the coverage desired.

This last paragraph was followed by a "Schedule of Company's Contribution Toward Medical Insurance and Dental Plan Premiums." It showed that PST would contribute either the full amount or some portion of the premium for active employees early retirees, disability retirees, and normal retirees, with certain contributions varied according to whether the participant had a family or not.

1981-84 CBA

24.1 Insurance

a. The Company shall select the insurance carrier(s) to provide the benefits provided in the Insurance Plans and agrees to continue the plans as described in the Insurance Booklet dated 4-79 and entitled "Insurance Plans for Hourly Employees and Their Dependents, Covering Life Insurance, Accident and Sickness, Hospital Surgical Expense—Major Medical Expense", dental, drugs and as revised.

b. The spouse (under the age of 65) of a deceased employee may continue participation in the active group Medical Insurance Plan for one year following the death of an employee. The first two months premium will be paid by the company; the spouse will make the remaining payments.

. . . .

e. Surgical-Medical

. . . .

5. Effective 8-01-82 the company will pay the full cost for retiree medical insurance. (No dental, no drug). Coverage will include "carve out" provision and full Medicare-B-refund for retiree over age 65.

The 1979 insurance booklet generally tracked the language reprinted above from the 1976 booklet, except that term life insurance reduced to $1,500 upon retirement.

Pursuant to the 1981-84 CBA, an insurance committee promulgated a new insurance booklet in April 1982. It largely followed the language of the 1979 booklet, except that term life insurance reduced to $2,000 upon retirement.

1984-86 CBA

24.1

a. The Company reserves the right to select or change the insurance carrier(s) or to self fund the negotiated group benefits.

b. The existing group medical, life, dental and accident and sickness coverages in effect on July 31, 1984 will be continued until the new group benefit plans become effective on October 1, 1984.

c. The existing group medical plan will be eliminated. In its place the company Comprehensive Health Plan will be installed. Employees will have

> the option of selecting the Company's Comprehensive Health Plan or one of the following Health Maintenance Organizations (HMO's):
>
> 1. Compcare
> 2. Family Health Plan
> 3. Maxicare
> 4. Samaritan Health Plan
>
> . . . The Company will pay the full premium contribution for either [Comprehensive or HMO] option.
> . . . .
>
> h. The spouse (under the age of 65) of a deceased employee may continue participation in the active Group Medical Plan for one year following the death of the employee. The first two months premium will be paid by the Company. The spouse will make the remaining payments.

Though the contract made no mention of retiree life insurance, an April 1985 booklet entitled *Group Benefit Plan* provided as follows:

> Benefits for Retirees
>
> The amount of life insurance of an active employee who retires in accordance with the normal or early retirement rules of the Group Policyholder will reduce to $2,000.00 at the end of the calendar month in which employment terminates.
>
> The amount of life insurance of an employee who is eligible for Disability Retirement Benefit under the retirement rules of the Group Policyholder will be continued at the amount then in effect until the end of the calendar month in which the employee attains age 65, at which time the amount of insurance reduces to $2,000.00.

Under the heading "Termination of Insurance," the booklet explained that insurance would terminate in a variety

of situations, including "upon expiration of the labor agreement unless extended, modified or amended by a subsequent agreement." Retirement is not specifically listed as a terminating occurrence.

The booklet went on to explain that "[m]edical expense benefits, subject to a Medicare 'carve out' limitation, are available to retirees and eligible dependents." A section on "Termination of Benefits" stated that health benefits would terminate

> (j) upon expiration of the labor agreement unless extended, modified or amended by a subsequent agreement;
>
> (k) with respect to dental benefits for disability retirees, coverage ceases the end of the month in which such retirees attain age 65;
>
> (l) with respect to dental benefits for employees electing early or normal retirement, coverage ceases the end of the month prior to the month in which such employees retire.

1986-88 CBA

The 1986-88 CBA continued the 80/20 health plan with additional HMO options. Section 24.1 provided as follows:

> j. Group medical and life coverages and Medicare Part B reimbursement for (a) current retirees and (b) employees who retire during the current contract shall be continued during the term of this Agreement.

The CBA's "Scope of Agreement" clause provided:

> This Agreement, the attached appendices and the supplemental letter agreements executed concurrently herewith constitute the sole and entire Agreement between the parties and supersedes all prior Agreements, oral or written, and expresses all the obligations of or restrictions imposed on the respective parties during its term. Such Agreement can only

be amended by a signed agreement executed by the parties. Such agreement shall be published and made available to employees.

The 1986 insurance booklet described "Benefits for Retirees" like this:

> During the term of the Collective Bargaining Agreement dated August 2, 1986, the Company will provide current and future retirees with the following amounts of life insurance:
>
> The amount of life insurance of an active employee who retires in accordance with the normal or early retirement rules of the Group Policyholder will reduce to $2,000.00 at the end of the calendar month in which employment terminates.
>
> The amount of life insurance of an employee who is eligible for Disability Retirement Benefit under the retirement rules of the Group Policyholder will be continued at the amount then in effect until the end of the calendar month in which the employee attains age 65, at which time the amount of insurance reduces to $2,000.00.

The booklet continued the wording of the "Termination of Insurance" section found in the 1985 booklet.

The same booklet outlined how retirees could obtain medical benefits:

> Current and future Retired Employees (including eligible dependents) who are retired in accordance with the retirement plan of the Company, shall also be eligible for the benefits described in the preceding pages during the term of the Collective Bargaining Agreement dated August 2, 1986, subject to the following limitations:
>
> 1. Accident and sickness benefits are only provided to active employees.

2. Dental expense benefits are only provided to Disability Retirees (until they reach age 65 for those who retired prior to August 1, 1986) and their eligible dependents. Employees retiring early or at normal retirement age are not eligible for dental coverage.

3. Medical expense benefits, subject to a Medicare "carve out" limitation, are available to retirees and eligible dependents.

The booklet stated that benefits would be terminated "upon expiration of the labor agreement unless extended, modified or amended by a subsequent agreement in the case of employees (active or inactive) and retirees."

Other Facts

In addition to the above agreements, PST issued a "Summary Plan Description" of its benefits program in 1977. This document stated:

> As an eligible retiree of the Pressed Steel Tank Co., Inc., the benefits listed below are available to you under this plan, with coverage effective upon your retirement date. Benefits include Health, Life and, for Early and Disability retirees, Dental insurance. Coverage will be effective upon your retirement date provided you agree to make any required contributions.

Though pension benefits (as opposed to welfare benefits) are not at issue in this case, each CBA except for the 1986-88 contract stated that PST "agrees that for the duration of this Agreement it will continue to maintain the Pressed Steel Tank Hourly Pension Plan . . . ." The 1986-88 CBA dropped the words "for the duration of this Agreement" from the pension provision.

A 1977 summary plan description of benefits for salaried retirees (as distinct from hourly retirees) explicitly reserved PST's right to modify or terminate benefits.

During a ten-week strike in 1975, PST's owner at the time, Norris Industries, paid retirees' life insurance premium but suspended such payments for active employees.

Finally, the parties produced conflicting testimony concerning the intent behind the addition of the phrase "during the term of this Agreement" to section 24.1j of the 1986-88 CBA.

DISCUSSION

The plaintiffs seek summary judgment under section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), and sections 502(a)(1)(B) and 502(a)(3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3).[1] They assert that the defendants breached the CBAs and violated ERISA.

ERISA exempts *welfare* plans from the strict vesting requirements imposed on *pension* plans. *Compare* 29 U.S.C. § 1051(1) *with* 29 U.S.C. § 1053(a). *See also Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988) (Congress rejected automatic vesting of welfare benefits because medical insurance involves unpredictable variables, whereas actuarial decisions concerning fixed annuities are based on stable data). The benefits contested here—health and life insurance—fit the definition of welfare benefits. 29 U.S.C. § 1002.

Though welfare benefits do not automatically vest under ERISA like pension benefits, the parties to a CBA may agree to have welfare benefits vest or, alternatively, may agree to permit their termination. *See, e.g., Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied sub nom. Anderson v. Slat-*

[1] The plaintiffs' remaining claims—that the defendants breached an "implied contract" and their fiduciary duty under ERISA—are not addressed in this order.

tery Group, Inc., 57 U.S.L.W. 3570 (1989); *Williams v. Wellman Thermal Systems Corp.*, 684 F. Supp. 584, 592 (S.D. Ind. 1988). Thus, I must determine the intention of PST and the Steelworkers and see if they agreed to lifetime or terminable health and life insurance for retirees.

In making this determination, I obviously begin with the language of the contracts. However, the plaintiffs and defendants dispute whether I can or should consider parol and other extrinsic evidence as well.

The Parol Evidence Problem

How does the "parol evidence rule" apply to the interpretation of a labor contract? In the seventh circuit, we know that (1) courts should apply a uniform national parol evidence rule rather than the parol evidence rule of a particular state; (2) the rule is meant to effect whatever intention the parties may have had to make their writing a complete expression of their agreement; and (3) "in deciding whether the premise for applying the rule to a particular contract—that a written agreement or agreements were intended to be a complete expression of the agreement between the defendants—is present, sensitivity to context is required." *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, 72 (7th Cir. 1983).

The parol evidence rule is triggered by an "integration" or "merger" clause that expresses the parties' intention to regard their written contract as the entire agreement. *Id. See also Merk v. Jewel Food Stores Division, Jewel Companies, Inc.*, 702 F. Supp. 1391, 1400 (N.D. Ill. 1988). The Steelworkers/PST CBAs, it seems, contained such integration provisions.[2] At first blush,

[2] Actually, the record before me shows only that the 1975-78 CBA contained such a clause. Instead of providing copies of the CBAs in their entirety, the lawyers attached the benefits pages to their pleadings and briefs. Nevertheless, PST's brief quoted the 1986-88 integration clause and asserted that all CBAs had them. Plaintiffs' brief discussed the 1986-88 integration clause and "its similar predecessors."

then, it appears that parol evidence should be excluded from consideration, as the defendants wish. But the rule is more complex and in fact authorizes consideration of evidence from outside the four corners of the CBAs.

The rule kicks in only when a written agreement is unambiguous. As Professor Arthur Corbin explained in his classic treatise on contracts,

> [w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.
>
> . . . .
>
> No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation it is determined what the writing means. The "parol evidence rule" is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation. Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted; and all those factors that are of assistance in this process may be proved by oral testimony.
>
> . . . The meaning to be discovered and applied is that which each party had reason to know would be given to the words by the other party. Antecedent and surrounding factors that throw light upon this question may be proved by any kind of relevant evidence.
>
> . . . .
>
> It very often happens that when two parties are trying to integrate their agreement in a writing they omit to state some fundamental assumption on the

> basis of which, as both of them well know, the agreement is being made. The mere existence of the writing should never be held to exclude testimony of such an unstated fundamental assumption.

3 A. Corbin, *Corbin on Contracts* §§ 573, 579, 590 (1960). *See also* 4 S. Williston & W. Jaeger, *Williston on Contracts*, Third Edition § 631 (1961) (rule fixes subject matter for interpretation but is not a rule of interpretation); *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 745 (7th Cir. 1988) (applying Indiana law, the rule does not bar testimony for interpretive purposes).

In sum, if I find that the CBAs are ambiguous, I can and should examine relevant evidence that helps clarify the intention of PST and the Steelworkers. I am not persuaded by the defendants' argument regarding the parol evidence rule or by their fall-back position—that ERISA requires benefits plans to be in writing, so consideration of noncontractual evidence is barred by that statute.

It is true that many courts have disapproved of oral testimony offered to show that employees detrimentally relied on statements by retirement plan administrators. But these cases are consistent with the parol evidence rule because the proffered testimony was intended to vary, not interpret, the written document. The claimants generally wanted to prevent plan administrators from following unambiguous terms of the plans. Thus, although these precedents might block an "implied contract" claim in this case (see footnote 1, *supra*), they do not limit my vision on the present summary judgment motion or, for that matter, the vision of the fact finder at trial. *See Reiherzer v. Shannon*, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978) (expressing "serious doubts" as to advisability of individual estoppel claims because they would allow statements of plan administrators to "alter" pension eligibility); *Nachwalter v. Christie*, 805 F.2d 956, 958-60 (11th Cir. 1986) (where nothing in plans permitted use

of the desired valuation date, court would not permit claim based on oral modification that trustees allegedly promised to one participant); *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488, 491-92 (2d Cir. 1988) (where employer "clearly reserved" right to terminate welfare plans, court rejected contrary claim that was based on informal communications between employer and employees); *Saret v. Triform Corp.*, 662 F. Supp. 312, 315-16 (N.D. Ill. 1986) (part-time employee could not make estoppel claim to assert eligibility under plan that was indisputably limited to full-time employees).

Apart from the workings of the parol evidence rule, there is no reason to avoid considering the PST/Steelworkers summary plan descriptions or the booklets referenced by the CBAs. The booklets were specifically incorporated into section 24 of the CBAs, and ERISA itself mandates that summary plan descriptions be promulgated to inform participants of their benefits. 29 U.S.C. § 1022. Indeed, summary plan descriptions must specify eligibility requirements and "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . . ." 29 U.S.C. § 1022(b). Given the context of this dispute—*see Mohr, supra*—the plan descriptions and booklets should be considered if the CBAs are not clear on their face.

The Ambiguous Intention—or Intentional Ambiguity

The CBAs are ambiguous. Section 24 of each merely stated that PST "will continue" or "agrees to continue" the various health and life insurance benefits. The phrase "will continue" could mean either that PST would provide benefits for the life of those who retire during the term of the contract, or it could mean that PST would provide retiree benefits during the life of the contract. The plaintiffs point out that the first interpretation is more reasonable because the CBAs also allowed certain surviving spouses to participate in the group medical plan for a

year following the death of the employee. The second interpretation, they note, would limit spousal participation to less than a year if the employee died within a year of the particular CBA's expiration.

The first interpretation might be the better one, but the second is not necessarily illogical. For example, the parties might have believed that contract renewals would occur as a matter of course, and so there would be no danger of spouses falling between the cracks. More to the point, I cannot rewrite the contract to find benefits that were not intended. The langauge of the CBAs does not manifest a meeting of the minds.

The insurance booklets are not much clearer. The plaintiffs argue that the 1973, 1976, 1979, and 1982 booklets made retirement "a specific exception to coverage terminating at the end of the month in which employment terminates and seniority is lost." But the "Termination of Employment" provisions of those booklets did not say as much. They simply directed the reader to "see" the provisions on retirement and conversion—hardly a substantive statement of intent.

The booklets declared that term life insurance coverage would be decreased upon retirement, and they explained that hospital coverage would be continued for retirees. Again, such provisions arguably suggest that lifetime benefits were intended, but it remains possible that PST and the Steelworkers actually meant otherwise. Similarly, the fact that PST reserved the right to terminate welfare benefits for salaried employees but did not do so for hourly workers does not lead to the conclusion that the parties contemplated lifetime welfare benefits for the latter. The defendants point to another possibility—"that there was never an agreement one way or the other, no meeting of the minds, no thought or consideration given to the question and no promise given, either." [3]

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[3] Of course, yet another possibility is that PST and/or the Steelworkers intended for the whole issue to remain ambiguous in the

There are some indications that the parties intended for benefits to be terminable. For example, welfare benefits changed with each contract (albeit upward in most instances). The 1985 booklet said benefits would terminate upon expiration of the contract. And no provision for vesting of welfare benefits appeared anywhere in the documents.

All in all, the evidence—the CBAs, summary plans, booklets, and deposition testimony—does not warrant summary judgment for the plaintiffs. *See Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984) (summary judgment improper where contractual language and extrinsic evidence were ambiguous as to whether retirement insurance benefits vested); *Williams v. Wellman Thermal Systems Corp.*, 684 F. Supp. 584, 599 (S.D. Ind. 1988) (denying summary judgment in dispute over welfare benefits expiration because contract ambiguous and extrinsic evidence needed). *See generally Amoco Oil Co. v. Cardinal Oil Co., Inc.*, 535 F. Supp. 661, 665 (E.D. Wis. 1982) (summary judgment generally not appropriate where parties' intent at issue).

Several of the cases cited by the plaintiffs involved preliminary injunctions, where the question was whether the employees had a likelihood of succeeding, not whether they were entitled to prevail on the merits in the final instance. Many other cases cited by the plaintiffs relied on a decision from the sixth circuit, the reasoning of which is disfavored in the seventh circuit. I will discuss the sixth circuit opinion in the next section of this opinion. This section closes with the denial of the plaintiffs' motion for summary judgment.

The Yard-Man Inference

My usual practice in denying summary judgment is to whenever possible merely write a short order and let the

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CBAs. Hence the subheading on this portion of my order. Union and management negotiators sometimes prefer loose language to avoid a confrontation with the opposing side over specifics.

parties battle out their differences at trial. But in this case, several issues need to be resolved before trial begins. One issue is the propriety of considering extrinsic evidence, which I discussed above. Another is the *Yard-Man* inference, a subject to which the parties devoted considerable attention.

In 1983, the court of appeals for the sixth circuit decided *UAW v. Yard-Man, Inc.*, a case that has since influenced much of the litigation over vesting of welfare benefits plans. 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). The court held that the parties' collective bargaining agreement had contemplated provision of health and life insurance benefits for the lifetime of the retirees, not just for the life of the contract. Much of *Yard-Man* is beyond objection—for example, the discussion of the rules of contract construction that should govern disputes such as this. *Id.* at 1479-80. The controversial portion of *Yard-Man* begins at page 1482:

> [R]etiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however,

> this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

The *Yard-Man* inference was probably narrowed by the sixth circuit itself in *UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984), where the court stated that "there is no legal *presumption* based on the status of retired employees . . . (emphasis added)." In any event, the inference was rejected by the court of appeals for the eighth circuit in *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988):

> Congress explicitly exempted welfare benefits from ERISA's vesting requirements. It, therefore, seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires. . . . We believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences.[4]

I agree with the defendants that the seventh circuit's position is closer to *Anderson* than *Yard-Man*. In *Merk v. Jewel Companies, Inc.*, retirees sued their former employer for breaching a contract and their union for breaching its duty of fair representation. 848 F.2d 761 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 393 (1988). The court stated:

> The entitlements established by collective bargaining agreements do not survive their expiration or modi-

---

[4] Plaintiffs contend that the eighth circuit may not be as hostile to the *Yard-Man* inference as *Anderson* indicates, since the *Anderson* court did not overrule *Local Union No. 150-A v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985) ("right to receive health and welfare benefits arises from the retiree's status as a past employee"). That may be, but *Merk, infra*, shows that the seventh circuit has adopted reasoning more akin to *Anderson*'s than *Dubuque*'s.

> fication. So if, for example, the 1982-85 agreement had established a plan under which Jewel provided health benefits for its employees and retirees, the Union and Jewel would have been free to abolish those benefits for subsequent periods, even though the Union does not represent retirees. . . . That the retirees had worked in earlier years in the expectation that they were receiving money today and health benefits later would not matter. Because of the time limit on the collective bargaining agreement, any subjective expectation they may have had is not enforceable. And the Union, which . . . does not necessarily represent retired workers, may choose to negoitate [sic] an agreement that provides more for today's workers and less for retirees.

Id. at 763 (citations omitted).

To be sure, *Merk* arose in a context different than the one I face, and the quoted paragraph contains dicta. Still, the strength of the language indicates that courts in the seventh circuit should not permit plaintiffs to take advantage of the *Yard-Man* inference.

What does this mean for this case? First, it is another reason why I am denying the plaintiffs' motion for summary judgment. Second, it means that at trial the plaintiffs will continue to carry the burden of showing that PST and the Steelworkers intended for retiree welfare benefits to be interminable. The retirees' status will be considered along with all the other relevant evidence, but it will not be accorded greater weight.

Similarly, I will reject an attempt to draw an inference in favor of lifetime benefits on the ground that PST paid retiree benefits during the 1975 strike, *i.e.*, when there was no CBA in effect. The *Bower* case, *supra*, hints at the existence of such an inference, but I think the better course is to allow the trier of fact to give evidence of strike payments any weight that it may deserve. The same holds true for the PST sales documents,

which, the plaintiffs say, show that the defendants understood they were assuming lifetime liabilities.

Jury or Bench Trial?

One final issue needs to be settled. The plaintiffs demanded a jury trial on the claims of those who retired after August 1986. They also demanded a jury trial on the pre-1986 retirees' claims, if I deny the present summary judgment motion (which I am doing). The defendants, however, assert that a jury trial is barred by *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

In *Wardle*, a teamster sued under section 502 of ERISA to challenge the pension fund's denial of retirement benefits. The court of appeals held that the plaintiff was not entitled to a jury trial because "Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable." *Id.* at 829. Moreover, the then-prevailing judicial standard of review in such suits—whether the trustees' decision was arbitrary and capricious—"bespeaks a legislative scheme granting initial discretionary decisionmaking to bodies other than the federal courts, with which federal jury trials have proved incompatible." *Id.* at 830.

The arbitrary and capricious standard has since been swept into the dustbin of history. *See Firestone Tire and Rubber Co. v. Bruch*, 57 U.S.L.W. 4194, —— U.S. —— (1989). What is more, the court of appeals for the seventh circuit held after *Wardle* that certain benefits actions may be tried to juries. *Bugher v. Feightner*, 722 F.2d 1356, 1360 (7th Cir. 1983), *cert. denied*, 469 U.S. 822 (1984). There, the trustees of a union pension fund sued to recover delinquent contributions from the employer. The *Bugher* plaintiffs—like the plaintiffs here—invoked both section 301 of the LMRA (29 U.S.C.

§ 185) and section 502 of ERISA (29 U.S.C. § 1132). The court, finding that ERISA was intended to supplement rights under the LMRA, stated:

> We conclude that plaintiffs had a legal remedy available to them, i.e., a claim for damages for breach of contract under 29 U.S.C. § 185(a), as well as an equitable remedy under 29 U.S.C. § 1132(a)(3). In this situation the Seventh Amendment issue is controlled by *Dairy Queen* [*v. Wood*, 369 U.S. 469 (1962)]. . . . [W]hether we construe plaintiffs' complaint as solely a legal claim or as a joinder of legal and equitable actions, the appellant was entitled to a jury trial on the legal issues.

Id. at 1360 (citations omitted).

In the present case, the plaintiffs make a legal claim for breach of contract and seek such damages as "an amount equal to all costs and expenses sustained by retired hourly employees and their spouses and eligible dependants as a result of the Defendants' failure and refusal to provide the various promised insurance benefits . . . ." (Second-Amended Complaint, page 19.) They also seek equitable injunctive relief.[5] Indeed, in my order of December 21, 1988, in which I certified the case as a class action, I stated my belief "that a final injunction is the primary aim of the plaintiffs. They want insurance coverage restored." For this reason, I certified the case under rule 23(b)(2) instead of 23(b)(3).

The mixture of legal and equitable claims does not nullify the plaintiffs' jury demand. *See Local 836 of the UAW v. Echlin, Inc.*, 670 F. Supp. 697, 707 n.6 (E.D. Mich. 1986) (LMRA breach-of-contract claim can be

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[5] Presumably, the plaintiffs want an injunction restoring benefits because no jury can calculate the value of the benefits that PST would have to pay for the remaining lifetimes of the class members. No jury, after all, can predict the lifespan of retirees and their spouses and children. *See Bugher*, 722 F.2d at 1360 (prerequisite to equitable action is inadequate legal remedy).

tried to jury first and control ERISA claim); *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 598 (E.D. Wash. 1986) (jury to determine meaning of contract and any damages for breach; court will decide additional claim for injunctive relief); *UAW v. Park-Ohio Industries, Inc.*, 661 F. Supp. 1281, 1310 (N.D. Ohio 1987) (denying motion to strike jury demand based on *Bugher*). *See generally Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (right to jury trial "must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims"). Consequently, the plaintiffs may have a jury hear their claim that the parties intended for retiree welfare benefits to last for the lifetime of the beneficiaries. The jury may also assess damages, if any, for the alleged breach, and I will entertain the plaintiffs' request for injunctive relief.

The preceding discussion raises a troubling question: In light of the plaintiffs' desire to have a jury hear their damage claims, should the case remain certified under rule 23(b)(2), which governs actions seeking "final injunctive relief with respect to the class as a whole?" Since my class certification was tentative—*see* page 7 of the December 21 order—the question is not foreclosed. I bring it up so counsel can give the matter some thought.

Conclusion

The plaintiffs' motion for partial summary judgment is DENIED.

The plaintiffs may have their legal claims tried to a jury and may attempt to introduce evidence consistent with this order.

A conference call is scheduled for Wednesday, June 7, 1989, at 9 a.m., at which time a trial date will be established. In the meantime, the parties are urged to work toward a settlement of their differences.

SO ORDERED at Milwaukee, Wisconsin this 9 day of May, 1989.

BY THE COURT:

/s/ Terence T. Evans
TERENCE T. EVANS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 87-C-1353

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON, on behalf of themselves and a class of all persons similarly situated,

Plaintiffs,

v.

AMCA INTERNATIONAL, a foreign corporation, PST, INC., a foreign corporation, and PRESSED STEEL TANK CORPORATION, INC., a foreign corporation,

Defendants.

VERDICT

[Filed Dec. 11, 1989]

Part A

As to employees of the company who retired when the 1975-78 collective bargaining agreement was in effect:

A-1. Have the plaintiffs convinced you that the 1975-78 collective bargaining agreement between the owners of Pressed Steel and the steelworkers union is unclear and ambiguous as to how long welfare benefits must be paid to retirees?

Yes —X—
No ———

If you answered "yes" to question A-1, then answer the following question.

A-2. Have the plaintiffs convinced you that it is necessary to go outside the agreement to interpret (not vary) what the intent of the company and the union was as to the duration of retirees' welfare benefits?

Yes —X—
No ———

If you answered "yes" to question A-2, then answer the following question.

A-3. Considering all of the evidence in this case, have the plaintiffs convinced you that the company and the union intended that retirees under the 1975-78 agreement would receive welfare benefits for the rest of their lives?

Yes —X—
No ———

Part B

As to employees of the company who retired when the 1978-81 collective bargaining agreement was in effect:

B-1. Have the plaintiffs convinced you that the 1978-81 collective bargaining agreement between the owners of Pressed Steel and the steelworkers union is unclear and ambiguous as to how long welfare benefits must be paid to retirees?

Yes —X—
No ———

If you answered "yes" to question B-1, then answer the following question.

B-2. Have the plaintiffs convinced you that it is necessary to go outside the agreement to interpret (not vary) what the intent of the company and the union was as to the duration of retirees' welfare benefits?

Yes —X—
No ———

If you answered "yes" to question B-2, then answer the following question.

B-3. Considering all of the evidence in this case, have the plaintiffs convinced you that the company and the union intended that retirees under the 1978-81 agreement would receive welfare benefits for the rest of their lives?

Yes —X—
No ———

Part C

As to employees of the company who retired when the 1981-84 collective bargaining agreement was in effect:

C-1. Have the plaintiffs convinced you that the 1981-84 collective bargaining agreement between the owners of Pressed Steel and the steelworkers union is unclear and ambiguous as to how long welfare benefits must be paid to retirees?

Yes —X—
No ———

If you answered "yes" to question C-1, then answer the following question.

C-2. Have the plaintiffs convinced you that it is necessary to go outside the agreement to interpret (not vary) what the intent of the company and the union was to the duration of retirees' welfare benefits?

Yes —X—
No ———

If you answered "yes" to question C-2, then answer the following question.

C-3. Considering all of the evidence in this case, have the plaintiffs convinced you that the company and the union intended that retirees under the 1981-84 agreement would receive welfare benefits for the rest of their lives?

Yes —X—
No ———

Part D

As to employees of the company who retired when the 1984-86 collective bargaining agreement was in effect:

D-1. Have the plaintiffs convinced you that the 1984-86 collective bargaining agreement between the owners of Pressed Steel and the steelworkers union is unclear and ambiguous as to how long welfare benefits must be paid to retirees?

Yes —X—
No ———

If you answered "yes" to question D-1, then answer the following question.

D-2. Have the plaintiffs convinced you that it is necessary to go outside the agreement to interpret (not vary) what the intent of the company and the union was as to the duration of retirees' welfare benefits?

Yes —X—
No ———

If you answered "yes" to question D-2, then answer the following question.

D-3. Considering all of the evidence in this case, have the plaintiffs convinced you that the company and the union intended that retirees under the 1984-86 agreement would receive welfare benefits for the rest of their lives?

Yes —X—
No ———

Part E

As to employees of the company who retired when the 1986-88 collective bargaining agreement was in effect:

E-1. Have the plaintiffs convinced you that the 1986-88 collective bargaining agreement between the owners of Pressed Steel and the steelworkers union

is unclear and ambiguous as to how long welfare benefits must be paid to retirees?

Yes —X—
No ———

If you answered "yes" to question E-1, then answer the following question.

E-2. Have the plaintiffs convinced you that it is necessary to go outside the agreement to interpret (not vary) what the intent of the company and the union was as to the duration of retirees' welfare benefits?

Yes —X—
No ———

If you answered "yes" to question E-2, then answer the following question.

E-3. Considering all of the evidence in this case, have the plaintiffs convinced you that the company and the union intended that retirees under the 1986-88 agreement would receive welfare benefits for the rest of their lives?

Yes —X—
No ———

/s/ Patricia M. Foy
Foreperson

Dated: 11 December, 1989

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3100

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, *et al.*,
Plaintiffs-Appellees,

v.

UNITED DOMINION INDUSTRIES, INCORPORATED, formerly known as AMCA INTERNATIONAL CORPORATION, PST, INCORPORATED and PRESSED STEEL TANK CORPORATION, INCORPORATED,
Defendants-Appellants.

On Petition for Rehearing with
Suggestion for Rehearing *En Banc*

DECIDED MAY 6, 1992

Before BAUER, *Chief Judge*, CUMMINGS, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*, and WILL, *Senior District Judge.**

COFFEY, *Circuit Judge*. On consideration of the petition for rehearing and suggestion for rehearing *en banc*

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

filed in the above-entitled cause by plaintiffs-appellees, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. All of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and rehearing *en banc* is hereby, DENIED.

CUDAHY, *Circuit Judge*, with whom CUMMINGS and RIPPLE, *Circuit Judges*, join, dissenting from the denial of rehearing *en banc*.

With the exception of the 1986-88 labor contract, each of the five agreements here, beginning in 1975, stated simply that the company will "pay the full cost" of retirees' coverage or that coverage "will continue." They did not specify whether coverage would continue for life or merely for the term of the contract. The panel holds, however, that the agreements were unambiguous on the basis of the "default rule in this Circuit"—that "entitlements established by collective bargaining agreements do not survive their expiration or modification." But parties can and often do provide for the vesting of benefits, as the court made clear in *Ryan v. Chromalloy American Corp.*, 877 F.2d 698, 603 (7th Cir. 1989). In the case before us, a jury considered the evidence and found overwhelmingly that the parties had intended to create lifetime benefits.

Every circuit that has confronted this situation has held that if the contractual language is ambiguous, extrinsic evidence should be considered to determine the parties' intent. *See, e.g., United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1260, 1261-62 & n.12 (5th Cir. 1990) (remanding for consideration of extrinsic evidence of intent where agreement "says nothing about the retirees' retirement benefits' ceasing after the agreement terminated"; "this matter must be deter-

mined on a contract-by-contract basis"); *Smith v. ABS Industries, Inc.*, 890 F.2d 841, 846-47 (6th Cir. 1989) (relying on extrinsic evidence where "this plan could have been more precise"); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1612, 1617 (8th Cir. 1988) (examining extrinsic evidence where contract does not provide for vesting); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223-24 (9th Cir. 1984) ("no inference can be drawn from the absence of an expiration date on the retirement insurance documents . . . we look to extrinsic evidence").

The panel's departure in the case before us is particularly striking, where the contractual *language* is undeniably ambiguous and where the extrinsic evidence reveals that all the parties intended that the retirees' coverage was for life. The panel's so-called default rule prevents extrinsic evidence from *ever* being considered by ensuring that such agreements are always "unambiguous"; if they do not say "lifetime" or "vested," then benefits necessarily terminate with the contract's termination. Such a departure from settled principles of contract interpretation is unwarranted and presents an important issue for ERISA and labor law. Critical retiree benefits are being placed at risk. This problem has nationwide ramifications and deserves our *en banc* consideration.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U.S.
FILED
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OFFICE

No. 92-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,
Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, petitioners file this supplemental brief to their petition for certiorari to apprise the Court of a recent development in the Seventh Circuit and to request that the Court either hold the petition in abeyance or grant the petition and vacate and remand the above-captioned case to the Seventh Circuit for reconsideration.

1. Petitioners timely filed their petition for certiorari in the above-captioned case ("*Senn*") on August 3, 1992. Later that same day, petitioners learned that in a case denominated *Bidlack v. Wheelabrator*, No. 91-2378, the Seventh Circuit had issued an order setting for hearing before the Court *en banc* the question whether *Senn* should be overruled. Specifically, the order states:

1. Whether *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), should be overruled. In particular, should this Circuit retain a default rule that health and welfare benefits established in collective bargaining agreements do not vest on an employee's retirement?

2. If this court retains *Senn*, under what circumstances, if any, may extrinsic evidence be used to demonstrate the parties' intent to create vested benefits? In particular, (a) should the *Senn* default rule be applied before or after resort to extrinsic evidence of the parties' intent, and (b) if the *Senn* default rule is applied before resort to extrinsic evidence, should it preclude such evidence in cases of extrinsic ambiguity?

2. If the Seventh Circuit overrules its decision in *Senn*, that decision would no longer be a suitable vehicle for this Court to use in resolving the three-way conflict among the circuit courts of appeals created by *Senn*. However, if the Seventh Circuit retains its decision in *Senn*, the petition for certiorari in *Senn* would continue to present the three-way conflict among the circuits described in the petition and should be granted for the reasons stated therein.

3. Petitioners therefore respectfully request that the Court either hold their petition for certiorari in abeyance pending the Seventh Circuit's *en banc* consideration of whether the decision in *Senn* should be overruled, or grant the petition and vacate and remand the case to the Seventh Circuit for reconsideration in light of that Court's pending *en banc* decision in *Bidlack v. Wheelabrator. E.g., Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

4. If this Court elects to hold the petition, and if the Seventh Circuit subsequently overrules *Senn*, petitioners ask that this Court simply grant the petition and vacate *Senn* and remand it to the Seventh Circuit for reconsideration. If, however, the Seventh Circuit retains its de-

cision in *Senn*, petitioners ask that this Court grant certiorari for the reasons set forth in the petition filed August 3, 1992.[1]

Respectfully submitted,

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[1] As a consequence of the Seventh Circuit's order, petitioners also filed in the Seventh Circuit a motion requesting the Court to recall its mandate in *Senn* and to either reconsider its decision in *Senn* simultaneously with its *en banc* consideration of *Bidlack v. Wheelabrator*, or hold *Senn* for reconsideration in light of the *en banc* Court's resolution of the questions set forth in its order setting *Bidlack* for *en banc* consideration. The pendency of the petition for certiorari does not deprive the Seventh Circuit of jurisdiction to recall the mandate, *see Oneida of the Thames Band v. N.Y.*, 771 F.2d 51 (2d Cir. 1985); *Kinnear Weed Corp. v. Humble Oil & Refining Co.*, 296 F.2d 215 (5th Cir. 1961). Of course, if the Court were to grant certiorari, that would immediately deprive the Court of Appeals of jurisdiction.

Supreme Court, U.S.
FILED
SEP 4 1992
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No. 92-216

IN THE

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OCTOBER TERM, 1992

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v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,

Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Seventh Circuit Court of Appeals denying rehearing is reported at 962 F.2d 655 (May 6, 1992), not in volume 965 as stated in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Section 1254 of the Judicial Code, 28 U.S.C. § 1254, provides:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Section 402(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1102(a)(1), provides in relevant part:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument.

COUNTER-STATEMENT OF THE CASE

This is a class action brought pursuant to section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a), and section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), seeking to require Respondents to provide Petitioners with free life insurance and medical benefits for the rest of their lives. Pet. App. 10a-11a. Petitioners base their claim on welfare benefit plans negotiated as part of collective bargaining agreements between their collective bargaining representative, the United Steelworkers of America ("the Steelworkers Union"), and Respondent PST, Inc.[1] Five collective bargaining agreements (CBAs),

[1] Respondent United Dominion Industries, Inc. is a publicly held corporation traded on the New York, Montreal and Toronto Stock Exchanges. Respondent PST, Inc. became a subsidiary of United Dominion Industries, Inc. in 1982, and still is. Pet. App. 6a. Respondent Pressed Steel Tank Co., Inc. is a privately-held cor-

(Footnote continued on following page)

seven insurance plan books or summary plan descriptions (SPDs), and two welfare benefit plans (1975-84 and 1984-88) are involved in this case. Pet. App. 2a-9a; Plaintiffs' Trial Exhibits Nos. 1-11, 13.

Petitioners leave out the most important provisions of the collective bargaining agreements: the expiration and integration clauses. The 1975 agreement provided:

> 25.2 Scope of Agreement. This Agreement and the supplemental letter agreements executed concurrently herewith constitute the sole and entire Agreement between the parties and supersedes all prior Agreements, oral or written, and expresses all the obligations of or restrictions imposed on the respective parties during its term. Such Agreement can only be amended by a signed agreement executed by the parties. Such agreement shall be published and made available to employees.
>
> SECTION 26
> DURATION OF AGREEMENT
>
> 26.1 This Agreement shall remain in full force and effect until midnight, July 31, 1978 . . . .

Pet. App. 2a-3a; Pl. Ex. 1, p. 43. Each of the next four collective bargaining agreements contained identical integration and expiration clauses, as sections 25.2 and 26.1 of each agreement—identical, save that they expired on July 31 of 1981, 1984, 1986, and 1988, respectively. Pet. App. 3a-9a; Pl. Exs. 2-5.

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[1] *continued*

poration with no parent or subsidiary corporations. The statement in the Petition (page 3, fn. 1) that Pressed Steel Tank purchased PST from United Dominion in 1987 (or at any other time) is incorrect. Pressed Steel Tank bought only PST's assets, including the name "Pressed Steel Tank Company." Pet. App. 2a.

Nothing in any of the five contracts or seven insurance books or SPDs prescribed a durational period for welfare benefits different from the July 31 expiration date fixed by § 26.1 of each agreement. No provision for vesting, nonforfeitability, or lifetime duration of welfare benefits appeared anywhere in any labor contract, benefit book, summary plan description, or other document, either before or after 1984. Pet. App. 19a-20a, 55a; Pl. Exs. 1-11, 13.

The Petition incorrectly states that there was trial testimony that PST representatives had stated that benefits would be for life. The actual testimony was that each Petitioner assumed benefits would be for life, and nobody told him otherwise, and that was the basis of their claim—nothing in writing, no discussion or agreement, and no oral representation of lifetime welfare benefits.[2] Tr. 149-150, 224, 231-232, 254-256, 277-278, 281-282.

The language of pre-1984 contracts is largely irrelevant because the old benefit plan was terminated by the 1984 labor agreement, and replaced by a new benefit plan. Pet. App. 6a. No pre-1984 retiree sued under ERISA to restore the old plan. Instead, all retirees transferred willingly into the new benefit plan. And the relief sought by Petitioners in this case, and granted by the District Court, is the restoration of the 1984-1988 benefit plan at the 1984-86 benefit levels, the highest level of benefits ever provided. Pet. App. 37a-38a. Petitioners wanted to turn back time to 1985, but no farther, because the level of benefits changed with every new contract: from a low benefit of a $3.90 contribution by the Company per month

[2] Except by a single person, not a class representative, who conceded on cross-examination he was told that about pension benefits. Tr. 176, 185.

under the 1975 agreement, increased in the 1978 and 1981 agreements, then a new plan with a choice of providers under the 1984 agreement—including full payment of premiums for four health maintenance organizations (HMOs)—but decreased benefits, with a cap on reimbursement for HMO premiums, under the 1986 agreement. Pet. App. 40a-55a. Thus only the terms of the 1984-88 benefit plan are pertinent to the Petition to this Court.

The 1984 collective bargaining agreement contained no reference to retiree welfare benefits at all; those were mentioned only in the summary plan description. Pet. App. 20a. The 1986 contract specifically tied the duration of retiree welfare benefits to the duration of the basic labor agreement:

> Group medical and life coverages and Medicare Part B reimbursement for (a) current retirees and (b) employees who retire during the current contract shall be continued during the term of this Agreement.

Pet. App. 6a.

The April 1985 and December 1986 summary plan descriptions, issued under the 1984 and 1986 contracts, specifically provided:

> TERMINATION OF BENEFITS
>
> The benefits provided directly by Pressed Steel Tank Company will terminate on the earliest of the following dates . . . :
>
> (a) the date the plan is terminated; . . .
>
> (j) upon expiration of the labor agreement unless extended, modified or amended in the case of employees (active or inactive) and retirees;
>
> * * *
>
> The right is reserved in the plan for the plan sponsor to terminate, suspend, withdraw, amend or modify

> the plan in whole or in part at any time, subject to the applicable provisions of the plan.

Pet. App. 7a-8a.

The District Court submitted this case to a jury. Pet. App. 12a. The jury never read any of the contracts, insurance booklets or other documents—never took them back to the jury room—and reached a verdict for Plaintiffs in 20 minutes. Pet. App. 13a; R. 82, Tr. 101, 103. On September 10, 1990 the District Court issued an Injunction which required Respondents to provide the Petitioners with the life insurance and medical benefits provided immediately prior to July 31, 1988—but at the highest, 1984-86 levels for pre-July 1, 1986 retirees. Pet. App. 37a-38a.[3]

Jack Hudson died in 1990 and is not really a Petitioner in this case.

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[3] Neither the Petitioners nor the District Court ever articulated any rationale for giving retirees during the 1975, 1978, and 1981 agreements a vested right to the higher benefits provided by the successor benefit plan between 1984 and 1986, Pet. App. 27a-36a, and that question was neither argued nor submitted to the jury. Pet. App. 63a-67a. The Court of Appeals did not address this issue because it determined that none of the collective bargaining agreements provided any retiree with any vested right to benefits at all, let alone at any particular level. Pet. App. 21a-22a.

REASONS THE WRIT SHOULD BE DENIED

I.

THIS COURT LACKS CERTIORARI JURISDICTION OF THIS CASE BECAUSE THE CASE WAS NOT "IN THE COURT OF APPEALS" WHEN THE PETITION WAS FILED.

This Court's certiorari jurisdiction extends only to "Cases in the courts of appeals." 28 U.S.C. § 1254. A case is "in" the court of appeals and within this Court's certiorari jurisdiction if the case is both on the court of appeals's docket and properly within that court's jurisdiction on the day and at the time the petition for writ of certiorari is filed. *United States v. Nixon*, 418 U.S. 683, 689-690, 94 S. Ct. 3090, 3098 (1974) (petition filed same day, but hours after, case docketed in court of appeals).

This case was not "in" the Court of Appeals on August 3, 1992, when the Petition was filed, because the Court of Appeals issued its mandate on May 13, 1992. Resp. App. 1b-2b. Issuance of the mandate formally ends appellate court jurisdiction. Jurisdiction then returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate—the District Court in this case. *Sgaraglino v. State Farm Fire & Cas. Co.*, 896 F.2d 420, 421 (9th Cir. 1990); *Johnson v. Bechtel Assoc. Professional Corp.*, 255 U.S. App. D.C. 198, 801 F.2d 412, 415 (D.C. Cir. 1986); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978).

The Federal Rules of Appellate Procedure recognize the mandate's effect on this Court's certiorari jurisdiction: Rule 41(b) allows the court of appeals to grant "A stay of the mandate pending application to the Supreme Court for a writ of certiorari," upon motion and notice. Petitioners, however, chose not to seek a stay and the man-

date issued on May 13, 1992, returning the case and the record to the District Court. Resp. App. 1b.

Petitioners have filed a Supplemental Brief in this Court, alleging that Petitioners have sought recall of the Seventh Circuit's mandate due to its action in another case in that Court. Recall of that Court's mandate would not restore jurisdiction to this Court, however, because whether a case is "in" the Court of Appeals is determined as of the date and hour the petition is filed. *United States v. Nixon*, 418 U.S. at 689-690, 94 S. Ct. at 3098.

This Court therefore lacks jurisdiction of this case, and the Petition must be denied.

II.

THERE IS NO CONFLICT BETWEEN CIRCUITS: THE "DEFAULT RULE" FOLLOWED BY THE COURT OF APPEALS IS THE TRADITIONAL BURDEN-OF-PROOF RULE FOLLOWED IN EVERY CIRCUIT, EVERY STATE, AND THIS COURT.

1. The "default rule" followed by the Court of Appeals is the traditional contract analysis.

The conflict between circuits cobbled up by Petitioners is largely imaginary.

The Petition assails the "default rule" followed by the Seventh Circuit Court of Appeals in this case: the traditional rule that entitlements established by collective bargaining agreements do not survive their expiration or modification. *Senn v. United Dominion Industries, Inc.*, Pet. App. 21a, 951 F.2d 806, 816, *reh'g denied en banc*, 962 F.2d 655 (7th Cir. 1992); *Merk v. Jewel Cos.*, 848 F.2d 761, 763 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988). This default rule is not nearly so dire as Petitioners think. Remember what a "default rule" means: it simply denotes

the allocation of the burden of proof. A "default rule" describes what happens when a party who has the burden of proof, or "risk of nonpersuasion," F.R.E. 301, fails to carry it. There is nothing remarkable or controversial about making a plaintiff bear the burden of proof that a particular promise is included within the parties' contract. That is the "default rule" in every circuit and in every state.

No Circuit shifts the burden of proof to the defendant employer, to prove an express agreement that retiree health benefits do *not* vest. Yet such a presumption is exactly what Petitioners advocated in the courts below, Pet. App. 55a-59a, and what they need to prevail in this case.

The Court of Appeals did not state any new rule in this case. All the court did was follow the traditional method of contract analysis. Traditional rules of contract interpretation apply to collective bargaining agreements generally, and to retiree welfare benefits cases in particular, as long as their application is consistent with federal labor policies. *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 931 (10th Cir. 1992) (citing *Senn* for this proposition); *United Paperworkers v. Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 600 (7th Cir. 1989); *Anderson v. Alpha Portland Industries, Inc.* ("*Anderson II*"), 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). The court must start with the language of the contract. *Anderson II*, 836 F.2d at 1517. The contract must be looked at as an integrated whole, with every provision given meaning and none rendered nugatory. *Ryan*, 877 F.2d at 604; *Yard-Man*, 716 F.2d at 1479-80. If the contract is not am-

biguous, then the court must interpret the contract as a matter of law. *Awbrey*, 961 F.2d at 931; *Senn*, Pet. App. 18a, 951 F.2d at 815; *Champion Int'l*, 908 F.2d at 1256; *Ryan*, 877 F.2d at 602. A contract is "ambiguous" only if it is reasonably susceptible of more than one meaning. *Champion Int'l*, 908 F.2d at 1256. Whether a contract is ambiguous is a question of law, which must be determined by looking within the four corners of the agreement. *Senn*, Pet. App. 18a, 951 F.2d at 806; *Champion Int'l*, 908 F.2d at 1256; *Ryan*, 877 F.2d at 602. Then, if the contract is ambiguous, and only then, the determination of the agreement of the parties becomes an issue of fact, and extrinsic evidence may be admitted to interpret (but not to vary) the ambiguous term of the contract. *Awbrey*, 961 F.2d at 931; *Senn*, Pet. App. 18a-19a, 951 F.2d at 806; *Champion Int'l*, 908 F.2d at 1256; *Anderson II*, 836 F.2d at 1517.

The proposition that contractual obligations terminate when a contract expires is self-evident: that is what expiration clauses are for. *Consolidated Bearings Co. v. Ehret-Krohn Corp.*, 913 F.2d 1224, 1230 (7th Cir. 1990) (common-law contract under Illinois law); *Penthouse Int'l, Ltd. v. Dominion Federal S. & L. Ass'n*, 855 F.2d 963, 975-976 (2d Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (common-law contract under New Jersey law); *Clark v. Ryan*, 818 F.2d 1102, 1106 (4th Cir. 1987) (collective bargaining agreement). When the contract does not prescribe an express durational provision, it is construed as terminable at will, not as continuing forever. *All Line, Inc. v. Rabar Corp.*, 919 F.2d 475, 479 (7th Cir. 1990) (contract under Illinois law); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1012 (7th Cir. 1985) (Illinois law); *Moorehouse v. Boeing Co.*, 501 F. Supp. 390, 395 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774

(3d Cir. 1980) (Pennsylvania law); *Miller v. Wikel Mfg. Co.*, 46 Ohio St. 2d 76, 545 N.E.2d 76, 79 (1989). A contract will not be construed as providing a perpetual or unlimited contract right unless the contract clearly states that that is the intent of the parties. *William B. Tanner Co. v. Sparta-Tomah Broadcasting Co.*, 716 F.2d 1155, 1159 (7th Cir. 1983) (Wisconsin law); *Town of Readsboro v. Hoosac Tunnel & W.R. Co.*, 6 F.2d 733, 735 (2d Cir. 1925) (Learned Hand, J.) (pre-1938 case arising in Vermont, applying national common law, relying on Massachusetts and Sixth Circuit precedents); *United States Surgical Corp. v. Oregon Medical & Surgical Specialties, Inc.*, 497 F. Supp. 68, 71 (S.D.N.Y. 1980) (New York law); *Boyle v. Reader's Subscription Inc.*, 481 F. Supp. 156, 158 (S.D.N.Y.), *aff'd mem.*, 614 F.2d 1285 (2d Cir. 1979) (New York law); *Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 661 & n.5 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) (New York and Missouri law follow same rule); *Shannon v. Civil Service Empl. Ins. Union*, 169 Cal. App. 2d 79, 337 P.2d 136, 138 (1959).

In this case, the Court of Appeals followed the traditional analysis, but did not have to follow it very far. The Court looked at the language of the agreements, Pet. App. 19a-20a; found that the agreements were not ambiguous, Pet. App. 20a; held that extrinsic evidence was neither necessary nor permissible, Pet. App. 21a; and proceeded to interpret the agreements as a matter of law, Pet. App. 21a. The Court determined that, absent any textual indication to the contrary, retiree welfare benefits expired when the contract did. Pet. App. 21a.

This Court recently applied the same "default rule" to determine whether contractual obligations survived the expiration of a collective bargaining agreement, in *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215

(1991). This Court did not consider or decide whether contractual obligations expire when the contract does. It did not have to: that proposition was self-evident and axiomatic, the starting point in the analysis, not the end result. The issue was whether statutory policies required an *exception* to the "default rule" that the entitlements of collective bargaining agreements do not survive their expiration (there, the duty to arbitrate). *Litton Financial*, 111 S. Ct. at 2221-2222. This Court wrote:

> [A]n expired contract has by its terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied.

Litton Financial Printing, 111 S. Ct. at 2225. This Court recognized an exception to that default rule: an obligation would continue after expiration if a right vested during the contract or if, under normal principles of contract interpretation, the contract provision survives expiration of the agreement. *Ibid.* That is the same inquiry performed by the Court of Appeals in this case. Pet. App. 19a-21a.

Every court which has considered the issue, including this Court, has held that there is no *statutory* obligation under ERISA for welfare benefits to vest upon retirement or to extend beyond contract expiration. *Massachusetts v. Morash*, 490 U.S. 107, 119, 109 S. Ct. 1668, 1675 (1985); *Yard-Man*, 716 F.2d at 1482. Welfare benefits vest only as a matter of agreement, or not at all. *Ryan*, 877 F.2d at 602; *Anderson II*, 836 F.2d at 1516; *Yard-Man*, 716 F.2d at 1480.

Thus the "default rule" applied by the Court of Appeals in this case is nothing unusual.

2. Decisions of other circuits in retiree benefits cases.

The analysis and decision of the Court of Appeals in this case follow the same approach taken by all but one of the other circuits in retiree welfare benefits cases (all except the Sixth). Retiree health benefits have come before the Seventh Circuit twice, in this case and in *Ryan*. Both times the Seventh Circuit followed traditional contract principles and placed the burden on the plaintiff retirees to prove an entitlement to benefits. The Eighth Circuit has repeatedly placed the burden of proof on plaintiff retirees; sometimes the plaintiffs win, sometimes they lose, depending on the terms of the agreements. *Anderson II*, 836 F.2d at 1517 (expressly rejecting *Yard-Man* "inference," cited by the Seventh Circuit in *Merk* and in this case); *DeGeare v. Alpha Portland Industries, Inc.*, 837 F.2d 812 (8th Cir. 1988), *vacated on other ground*, 489 U.S. 1049 (1989); *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990). The Fifth Circuit expressly rejected the Sixth Circuit's *Yard-Man* "inference," which Petitioners seek to enlarge, and put the burden on the retiree-plaintiff to prove a right to lifetime benefits. *Champion Int'l*, 908 F.2d at 1261 n.12. The Eleventh Circuit also requires a right to post-retirement benefits to be established by contract, rather than presumed. *Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 675 (1991). Recently the Second Circuit construed plan language virtually identical to that in the 1986 collective bargaining agreement in this case—"Health care benefits are guaranteed during the term of this Agreement"—as requiring continuation of benefits until the end of the agreement, and no longer. *In re Chateaugay Corp.*, 945 F.2d 1205, 1208 (2d Cir. 1991), *cert. denied, sub nom. UMW 1974 Benefit Plan v. LTV Steel Co.*, 112 S. Ct. 1167 (1992). A very recent Tenth Circuit

decision involving retiree health benefits cited *Senn* approvingly for its application of traditional contract principles, and refused to admit extrinsic evidence to alter an unambiguous agreement. *Awbrey*, 961 F.2d at 931. The Fourth Circuit recently approved a unilateral plan amendment which required retirees to contribute a fraction of the cost of their medical benefits. *Pierce v. Security Trust Life Ins. Co.*, No. 90-1101, slip op., ____ F.2d ____ (4th Cir. July 2, 1992). The current trend among the Circuits is uniform and consistent with the Seventh Circuit's approach taken in *Merk*, *Ryan*, and this case.

All of these cases follow the traditional contract analysis, but they are informed by two principles peculiar to ERISA. First, welfare benefits do not vest as a matter of law, but only by agreement, as the result of a deliberate policy choice made by Congress. *Massachusetts v. Morash*, 490 U.S. at 119. Second, Congress enacted a statute of frauds for employee benefit plans:

> Every benefit plan shall be established and maintained pursuant to a written instrument.

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Thus welfare benefits do not vest upon retirement as a matter of law, but only as a matter of agreement. *Ryan*, 877 F.2d at 602.

There is a line of cases inconsistent with the majority approach exemplified by *Senn*, but it is a smaller and more irregular line than Petitioners describe—it exists only in the Sixth Circuit, and not always there. Even the Sixth Circuit purports to apply traditional contract principles. *Yard-Man*, 716 F.2d at 1479. But the Sixth Circuit's decision in *Yard-Man* characterized retiree welfare benefits as "status benefits" and posited an "inference" that welfare benefits vest upon retirement, and continue

as long as retirement "status" is maintained. This Sixth Circuit heresy has been criticized and rejected in every other Circuit which has considered it, expressly by the Eighth and Fifth Circuits in *Anderson II* and *Champion Int'l*, and implicitly by the Second, Fourth, Seventh, Tenth and Eleventh Circuits in *In re Chateaugay*, *Pierce*, *Senn* and *Ryan*, *Awbrey*, and *Alday*.

It is significant that Petitioners do not cite *Howe*, *In re Chateaugay*, *Pierce*, *Ryan*, *Awbrey*, or *Alday*. Recognizing these cases would have demolished Petitioners' thesis that the Circuits are splintered into several different approaches.

And the cases Petitioners do cite are falsely described. For example, the Fourth Circuit did not expressly adopt the *Yard-Man* "inference," as Petitioners allege, in *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989). Rather, the *Keffer* panel cited *Yard-Man* for the unexciting proposition that retiree benefits are a permissive, not mandatory, subject of bargaining. And the benefits booklet in *Keffer* unambiguously provided that retirees "shall not have such coverage terminated or reduced . . . so long as the individual remains retired from the Company or receives a Surviving Spouse's benefit, *notwithstanding the expiration of this agreement.*" *Keffer*, 872 F.2d at 63 (emphasis by the Court). This unambiguous lifetime benefits provision is enforceable even under the most rigorous standard, that of *Senn* (Petitioners' exaggerated version) and *Litton Financial Printing*. The Fourth Circuit certainly did not apply the *Yard-Man* inference in *Pierce*, and it certainly did not apply the *Yard-Man* inference in *District 17, UMW v. Allied Corp.*, 735 F.2d 121, 124 (4th Cir. 1984), *on reh'g en banc*, 765 F.2d 412, 417, 421 (1985), or in *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588, 591-592 (4th Cir. 1985), when that Circuit held that con-

tract language identical to the language in this case ("during the term of the agreement") required the employer to provide benefits during the term of the agreement, and no longer.

The First, Third, Eighth, Ninth and Eleventh Circuit decisions Petitioners cite do not help them paint their picture of schism either. The First Circuit decision, *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987), was not even a decision on the merits. Rather, it was an appeal from a preliminary injunction; the issue was whether the district court abused its discretion in balancing the four criteria, and in that case the most important issue was irreparable harm, with likelihood of success of only secondary importance. The Ninth Circuit decision in *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984), applied a traditional contract analysis—just like the Seventh Circuit did in this case—concluded that disputed issues of fact precluded entry of summary judgment in favor of the employer, and reversed the summary judgment. The Eighth Circuit opinion in *Anderson II* did not "approv[e] of the resort to extrinsic evidence where the contract was ambiguous," as Petitioners claim. Pet. 15. Rather, the Court "assume[d]" the district court found the language ambiguous because it did consider extrinsic evidence. 836 F.2d at 1517. Because that court, like this Court, reviews judgments rather than opinions, it affirmed the judgment in favor of the employer. In *Strubbe v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325, 330-331 (3d Cir. 1984), the Third Circuit ignored *Yard-Man*, held that benefits did not survive expiration of the contract, and affirmed summary judgment for the employer. In *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989), the Eleventh Circuit considered the same unambiguous lifetime-benefits

provision as *Keffer* and, not surprisingly, reached the same result. All of these decisions are more consistent with *Senn* than with *Yard-Man*.

Thus there is no three-way split between the Circuits, such as Petitioners describe. The differences in results, and in resort to extrinsic evidence, result from the different contract language in each case, not from any radical differences in analysis. All of the Circuits, even the Sixth, follow the traditional contract analysis.

But the Sixth Circuit, hobbled by the *Yard-Man* inference, does not follow the traditional path very well. In fact, the Sixth Circuit is even out of step with itself. There seems to be a conflict *within* the Sixth Circuit: sometimes it draws an "inference" that welfare benefits vest upon retirement, as it did in *Yard-Man* and in *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1291 (6th Cir. 1991), and *Smith v. ABS Industries, Inc.*, 890 F.2d 841, 842 (6th Cir. 1989). Sometimes it goes farther and purports to impose an outright presumption that welfare benefits vest upon retirement, and shifts to the defendant employer the risk of non-persuasion—which is what Petitioners plan to urge upon this Court. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 692 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616, 617 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986) (recognizing a "strong presumption" of intent to vest retiree benefits). (Note, however, that both *Weimer* and *Policy* concerned express lifetime-benefits provisions, which are enforceable without need of an inference or presumption—even under the rule of *Senn* and *Litton*.) Sometimes the Sixth Circuit disclaims any presumption of vesting. *International Union, UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984). Sometimes the Sixth Circuit ignores the *Yard-Man* inference entirely, and issues a

mainstream retiree-benefits decision that could have easily have come from the Second, Third, Fourth, Fifth, Seventh, Eighth, Tenth or Eleventh Circuits. *Musto v. American General Life Ins. Co.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). Thus there is no real Sixth Circuit "rule." The Sixth Circuit is more fragmented by itself than the other eleven circuits as a group.

This Court does not sit to resolve *intra*circuit conflicts: that wound must be healed by the Sixth Circuit itself, sitting *en banc*. *Davis v. United States*, 417 U.S. 333, 340, 94 S. Ct. 2298, 2302 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S. Ct. 633, 634 (1957) (per curiam). Even the Sixth Circuit must surely get the message after *Litton Financial Printing*. Once it does, there will be no conflict between circuits.

And if it does not, and if this Court then determines that review of this issue is necessary—then the Court should do what it did in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989): take a case from the one Circuit that is out of step with all the rest, because it is most likely to be wrong. In *Firestone*, that was the Third Circuit, the only circuit to require *de novo* review of benefit determinations. In this case, the *Yard-Man* inference prevails only in the Sixth Circuit, and only sometimes. If the Sixth Court does not correct its mistake in light of *Litton*, and this Court has to do the job, it should await an appropriate case from the Sixth Circuit.

3. Petitioners exaggerate the "default rule" followed in this case.

Petitioners' effort to paint the *Senn* "default rule" as more horrible than it really is requires them to exaggerate what the Court of Appeals did, and make things up where

exaggeration is not enough—to turn a backyard bush into a moonlight monster.

First, Petitioners exaggerate the "default rule" itself. They describe it as:

> a "default rule," that, in the absence of a clear and express statement in the agreement that the retiree insurance benefits are intended to continue beyond the term of the contract, " 'entitlements established by collective bargaining agreements do not survive [the contract's] expiration or modification.' "

Pet. 13. The last fourteen words of this statement comprise the actual default rule followed by the Court of Appeals. The first thirty-one words are Petitioners' own hyperbole.

Second, Petitioners describe this default rule as the "*Senn* presumption" or as a "conclusive presumption." Pet. 13, 15. It is not a presumption at all. A presumption shifts the burden of going forward with evidence to the party against whom the presumption operates. F.R.E. 301. But the whole point of the *Senn* default rule is that the burden does *not* shift: the burden remains on the plaintiff to prove his case, just like any other contract case.

Third, Petitioners assert that under the "default rule" (or at least their inflated description of it) "only two possibilities are contemplated": either the contract language "clearly and expressly states" that retiree benefits survive contract expiration, in which case no extrinsic evidence will be considered; or the entitlement to benefits will be conclusively presumed to expire with the contract. Pet. 17.

That is a very deceptive statement. That is not what the Court of Appeals did at all. Instead, the Court of Ap-

peals contemplated *four* distinct possibilities. The first possibility was an express vesting provision: that, obviously, was not present, and Petitioners have never claimed it was. Pet. App. 19a-20a. The second possibility was an ambiguity, which could justify resort to extrinsic evidence—and the Court could not find that either. Pet. App. 20a-21a. The third possibility was contractual silence, which the Court refused to equate with ambiguity. Pet. App. 21a. Of course not: under traditional contract principles, silence means "no promise" and the plaintiff loses on the burden of proof. The fourth possibility is an unambiguous provision that benefits do *not* vest. And *that* is what the Court of Appeals found in the record of this case, in the 1986 CBA and 1985 and 1986 SPDs.

There lies exposed the weaknesses in Petitioners' argument: their clouded view of traditional contract law, and the blind eye they turn toward the text of the agreements and SPDs. For the agreements are not silent. Each of them contains an expiration clause which is *not* ambiguous: the terms "This Agreement," the adverb "until" and the date are unambiguous, particularly in light of *Litton*'s lesson on black letter contract law. The express tie between the duration of benefits and the duration of the basic agreement, in the 1986 contract and in the 1985 and 1986 SPDs, is also unambiguous and eliminates any doubt as to whether retiree benefits continue past contract expiration. Even the Sixth Circuit gives effect to an unambiguous termination clause. *Musto*, 861 F.2d at 906.

In fact, both the question as described by Petitioners, and the actual issue of the allocation of the burden of proof, are largely moot given the actual record in this case. Regardless which one of the real or imaginary approaches described by Petitioners a court takes, regardless which side has the burden of proof, in this case the

post-1984 benefit plan contains unambiguous termination clauses. So any disquisition by this Court on the subjects of burden of proof, ambiguity or extrinsic evidence will be merely an advisory opinion. It cannot make a difference in the disposition of this case.

Plaintiffs seek to minimize the importance of the SPDs by relegating them to a footnote, and claiming that "As extrinsic evidence of the meaning of the 1984-86 agreement, PST introduced an insurance agreement purporting to describe the benefits negotiated in that agreement." Pet. 7 n.6. This statement is wrong in two respects. First, PST did not introduce the SPDs: they were Plaintiffs' Trial Exhibits 10 and 11. Second, they were not "extrinsic evidence" at all, but "part of the contract" according to Plaintiffs' opening statement and closing argument (Trial Tr. 5, 6; R. 82, Last-day Tr. 39), and "incorporated into it [i.e., the collective bargaining agreement] by reference" according to the jury instructions (R. 82, Last-day Tr. 24).[4] The Court of Appeals agreed with Petitioners that because the insurance books and SPDs "were explicitly incorporated into each of the collective bargaining agreements, they constitute part of the contract rather than extrinsic evidence." Pet. App. 19a n.9. This Court does not decide issues which were not raised or litigated in the lower courts, and will not entertain an argument that seeks reversal based on stipulations or jury instructions that the petitioner himself requested. *City of Springfield v. Kibbe*, 480 U.S. 257, 259, 107 S. Ct. 1114, 1115 (1987) (per curiam). Thus Petitioners are bound by their argu-

[4] This instruction was derived from a stipulation in chambers that all the insurance books and SPDs were incorporated into the collective bargaining agreements. Plaintiffs obviously did not object to this instruction.

ments and stipulations in the trial court that the SPDs are an essential part of the contract.[5]

Petitioners want to turn this Court into a trial court. They want to try a different case, with a different record and different arguments, than the case they tried in Milwaukee in December 1989 and argued before the Seventh Circuit in April 1991. That is not surprising, for this Court's decision in *Litton* in June 1991 destroyed their original arguments. But this Court is not a trial court.

4. The "low threshold" for extrinsic evidence.

As a secondary argument, Petitioners claim there is a conflict between the traditional "default rule" followed in *Senn*, *Litton* and all of the States and Circuits, and a number of decisions in another context which hold that extrinsic evidence is uniquely appropriate in construing collective bargaining agreements.

First, this argument is another one that is not properly before the Court, because Plaintiffs failed to raise it in the District Court or Court of Appeals. In the District Court, both in their motion for summary judgment and in discussions in chambers about jury instructions and

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[5] The statement in footnote 6 of the Petition that the 1985 and 1986 SPDs were unilaterally prepared by the Company, and the implication that they somehow are of less effect, is a variation of the same argument that the SPDs are not part of the contract. Again, this argument is precluded by Petitioners' argument and stipulations at trial. Of course the Company prepared the SPDs unilaterally: ERISA requires plan administrators to prepare and distribute them. ERISA § 101, 29 U.S.C. § 1021. It is significant that the union never filed a grievance, the insurance committee never complained, and when the 1986 contract was negotiated it contained the same explicit tie between retiree health benefits and the duration of the agreement that had earlier appeared in the 1985 SPD.

the special verdict, they advocated the traditional approach—ambiguity first, determined by the court as a matter of law; then consider extrinsic evidence if permissible—as the District Court acknowledged in explaining its unorthodox decision to submit the legal issue of ambiguity to the jury.[6]

Second, there is no conflict because the two approaches apply to two different problems. The cases cited by Petitioners involve the employment relationship during the term of an agreement, during which the contract must become "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate [and which] covers the whole employment relationship." *Transportation-Communication Employees Union v. Union Pac. R.R.*, 385 U.S. 157, 160-161, 87 S. Ct. 369, 371 (1966), *reh'g denied*, 385 U.S. 1032 (1967). The parties are not only allowed, but required, to fill in blank spots between negotiations, and they often employ arbitrators to do it for them. Several of the cases cited by Petitioners, not surprisingly, involve arbitration. Only one of the cases cited by Petitioners involves welfare benefits or any other ERISA issue.

Congress has decided that pension plans and other benefit plans require different, much more formal treatment. For them Congress enacted a "comprehensive and retieu-

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[6] "The plaintiff and the defendant have both asked me to decide the question of whether or not the individual collective bargaining agreements are ambiguous. And although I don't necessarily disagree with the position that it is a question of law, it should be decided by the Court in the context of this case, I'm going to submit it to the jury. And the jury's verdict on the point may be viewed as merely advisory . . . ." R. 82, Last-day Tr. 3. See also Pet. App. 50a-55a; R. 39, 45, Plaintiffs' briefs in support of motion for summary judgment.

lated" federal law of trusts, called ERISA. *Firestone Tire & Rubber*, 109 S. Ct. at 953-954. That "comprehensive and reticulated statute" includes a statute of frauds, which requires every benefit plan to be in writing. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Thus "the efficacy of [Petitioners'] claim under ERISA turns solely upon the terms of the written instruments governing the plan." *Ryan*, 877 F.2d at 603; *accord Musto*, 861 F.2d at 910. No reported decision about welfare benefits disagrees with this central holding of *Ryan*, and of the panel decision in this case. No Circuit has any great difficulty distinguishing between the two situations. And Congress also distinguished between the two contexts: it provided easy access to the courts in lieu of arbitration, both because retirees are not members of the bargaining unit and lack recourse to traditional means of dispute resolution, and because arbitrators possess expertise in "the law of the shop, not the law of the land," and possess no special expertise in the administration of trusts. *Anderson v. Alpha Portland Industries, Inc.* ("*Anderson I*"), 752 F.2d 1293, 1300 (8th Cir.) (en banc), *cert. denied*, 471 U.S. 1102 (1985). The need for judicial expertise, and to spell out obligations in black and white, is critical when dealing in lifetime obligations for large classes of employees, where one wrong decision can easily put an employer out of business.

Third, the issue is not fairly presented by the record in this case. There was no evidence of an actual agreement, or of any oral representation, that benefits would continue forever. The "extrinsic evidence" is not really evidence at all, just the subjective beliefs of the Plaintiffs. If the courts allowed this into evidence, then neither the rights of beneficiaries nor the obligations of sponsors

and trustees would ever become fixed by written instruments, as Congress mandated. Every claim would come down to a swearing contest and jury nullification of carefully-drafted, unambiguous benefit plan documents—just as it happened in this case.

III.

THIS COURT SHOULD NOT HOLD THE PETITION PENDING THE SEVENTH CIRCUIT'S RESOLUTION OF *BIDLACK v. WHEELABRATOR CORP.*

Petitioners filed a Supplemental Brief which asked this Court to hold the Petition until the Seventh Circuit Court of Appeals decides *Bidlack v. Wheelabrator Corp.*, No. 91-2378, in banc, and then either grant the Petition or remand the case to the Seventh Circuit for reconsideration in light of *Bidlack*.

This Court should do no such thing. First, this Court has no jurisdiction to consider the Petition because the case is not "in" the Court of Appeals. Even if the Seventh Circuit recalls its mandate, that will not cure the problem, for the question whether a case is "in" the Court of Appeals is determined as of the date and hour of the filing of the Petition in this Court. *United States v. Nixon*, 418 U.S. at 689, 94 S. Ct. at 3098.

Second, it is unlikely the Seventh Circuit will either recall its mandate in *Senn* or overrule the *Senn* "default rule" in *Bidlack*, because the *Senn* default rule prevails in almost every Circuit. Moreover, there is a significant difference between this case and *Bidlack*: the records, and particularly the plan language involved. The same Court of Appeals that ordered consideration in banc on the record presented in *Bidlack*, found it unwarranted on the record of this case. That probably has something to do

with the unambiguous termination clauses in the SPDs, and the explicit duration-of-benefits provision in the 1986 contract, which required judgment for the employer in this case regardless who has the burden of proof.

Third, the Petition should be judged on its own merits. There is no clear conflict between the Circuits now, and this case does not satisfy the criteria for review by this Court.

Fourth, Petitioners suggest that this Court should grant certiorari and remand the case for reconsideration in light of *Bidlack*, citing *Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991). But there is no comparison between *Brown Group* and this case. First, both *Brown Group* and *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990), *on reh'g en banc*, 935 F.2d 947 (1991), involved diametrically opposite rulings on a pure issue of law—the continuing viability of a particular cause of action, in light of a new decision from this Court—and could not be reconciled. Second, *Brown Group* was clearly inconsistent both with this Court's new decision and with the weight of authority in other Circuits, *Taggart*, 915 F.2d at 397, and the Eighth Circuit was likely to adopt the opposite view in *Taggart*. In this case, however, it is extremely unlikely the Seventh Circuit will overrule *Senn*. And even if it does, *Senn* and *Bidlack* can be reconciled on the basis of their different records, and the unambiguous termination clause in this case.

Petitioners' Supplemental Brief offers the Court no reason to hold the Petition in this case pending the Seventh Circuit decision in *Bidlack* or to remand this case to the Seventh Circuit. The Court should deny the Petition forthwith.

CONCLUSION

Petitioners seek relief in the wrong forum. This Court is not a trial court. This Court does not sit to resolve conflicts within a single Circuit. And most importantly, this Court is not the Congress.

For it is to Congress the Plaintiffs must turn for relief, as Senior District Judge Will recognized in his trenchant concurrence in the Court of Appeals. The issue of retiree health benefits is important, but its importance in this election year is political, not legal. The courts are doing their job: analyzing welfare benefit plans under traditional contract principles; enforcing agreements to provide benefits for life, where such agreements were actually made, as in *Policy* and *Keffer*; and refusing to legislate lifetime benefits where the parties never agreed to them.

Respondents pray the Court to DENY the Petition for Writ of Certiorari.

Respectfully submitted,

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September 4, 1992

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

DATE: May 13, 1992

TO: Sofron B. Nedilsky
United States District Court
Eastern District of Wisconsin
Room 362
517 E. Wisconsin Avenue
U.S. Courthouse & Federal Building
Milwaukee, WI 53202

FROM: Thomas F. Strubbe, Clerk

RE: 90-3100
Senn, Norman v. United Dominion Ind
87 C 1353, Judge Terence T. Evans

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[ ] No record filed
[×] Original record on appeal consisting of:

ENCLOSED:		TO BE RETURNED AT LATER DATE:
[2]	Volumes of pleadings	[ ]
[11]	Loose pleadings	[ ]
[8]	Volumes of transcripts	[ ]

[7]	Charts of exhibits	[ ]
[ ]	Volumes of depositions	[ ]
[ ]	In Camera material	[ ]
[1]	Folder of exhibits	[ ]

Record being retained for use in Appeal No. _____ [ ]

Copies of this notice sent to: Counsel of record

[ ] United States Marshall
[ ] United States Probation Office

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date: _____ _____

Deputy Clerk, U.S. District Court

(1071-010891)

Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

No. 92-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NORMAN SENN, CLEMENS KIEN, PAUL GILMORE, JOHN GROSS, and JACK HUDSON,

Petitioners,

v.

UNITED DOMINION INDUSTRIES, INC., PST, INC., and PRESSED STEEL TANK CO., INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On September 1, 1992 the United States Court of Appeals for the Seventh Circuit denied Appellees' Motion to Recall the Mandate, described in Petitioners' Supplemental Brief. Appellees there are Petitioners in this Court.[1] The Court

[1] Respondent United Dominion Industries, Inc. is a publicly held corporation traded on the New York, Montreal and Toronto Stock Exchanges. Respondent PST, Inc. is a subsidiary of United Dominion Industries, Inc. Respondent Pressed Steel Tank Co., Inc. is a privately-held corporation with no parent or subsidiary corporations.

of Appeals's order denying recall of its mandate was not an exercise of its appellate jurisdiction which would affect its previous reversal, the entry of final judgment by the district court, or ensuing appeals. *Johnson v. Bechtel Assoc. P.C.*, 255 U.S. App. D.C. 198, 801 F.2d 412, 416 n.25 (1986) (per curiam). Thus the pendency and denial of Appellees' Motion to Recall the Mandate did not put the case back "in" the Court of Appeals, even for a moment.

Respectfully submitted,

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September 16, 1992

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

ARGUMENT

1. Respondents contend that this Court lacks jurisdiction over this case because the petition, although timely filed under this Court's rules, was filed after the Court of Appeals issued its mandate. This contention exemplifies the disingenuousness that characterizes respondents' Brief in Opposition ("Opp."). There is a long, unbroken line of decisions in this Court *rejecting* this very jurisdictional contention. *See Aetna Casualty & Sur. Co. v. Flowers*, 330 U.S. 464, 467 (1947) ("[n]or does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction"). *See also, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579, 581

n.2 (1983); *Carr v. Zaja*, 283 U.S. 52, 53 (1931); Stern, Gressman & Shapiro, *Supreme Court Practice* 674 (6th ed. 1986). But respondents do not cite, much less do business with, these dispositive authorities.

2. Respondents' efforts to deny the existence of a conflict among the circuits is cut from the same type of cloth.

In the petition for certiorari, we demonstrated that the courts of appeals apply three different rules of interpretation in determining whether collectively bargained insurance benefits to which employees become entitled upon retirement are intended to be a permanent part of those employees' retirement packages or simply to remain a part of that package for the duration of the agreement under which the retirement occurs: (i) the rule adopted by the Seventh Circuit in the instant case (in the absence of a clear and express statement in the agreement that the retiree insurance benefits are intended to continue beyond the term of the contract, "entitlements established by collective bargaining agreements do not survive [the contract's] expiration or modification," Pet. App. 21a); (ii) the rule adopted by the Sixth and Fourth Circuits in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), and *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989), respectively ("when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree," 716 F.2d at 1482);[1] and (iii) the rule followed by

[1] Contrary to respondents' representation, the Fourth Circuit in *Keffer* did not cite *Yard-Man* solely for the proposition that retiree benefits are a permissive, rather than a mandatory subject of bargaining. Opp. at 15. Instead, the court cited with approval the *Yard-Man* court's conclusion that "'it is unlikely that [retiree insurance] benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations.'" *Keffer*, *supra*, 872 F.2d at 64 (quoting *Yard-Man*, *supra*, 716 F.2d at 1482).

all the other circuits that have addressed the question (absent express contract language as to the duration of retiree insurance benefits, it is appropriate to consider extrinsic evidence in determining whether the benefits were intended to vest for the entirety of each retiring employee's retirement, *see* Petition at 14-17).

Respondents claim that we have "cobbled up" this conflict among the circuits (Opp. at 8); that there is no difference as to the rule of law applied by the various courts of appeals; and that any apparent differences in outcome are explained by variations in the language of the agreements involved in particular cases. Respondents contend that all of the circuits—including the court below—"follow the traditional method of contract analysis" (Opp. at 9), looking to extrinsic evidence only if the contract language is ambiguous.

But respondents skip over the inconvenience that the circuits take different legal positions as to *what is considered ambiguous contract language* in the context of determining the duration of retiree insurance benefits.

Thus, the court below squarely held that where a collective bargaining agreement provides retiree insurance benefits but does not expressly state that such benefits are "vested" or "for life," and the agreement contains a general termination clause, the agreement is *not* ambiguous with respect to the intended duration of such benefits and extrinsic evidence may *not* be admitted as an aid to interpretation of the agreement. Pet. App. 19a-21a. We cannot describe the holding any better than did the dissenters from the Seventh Circuit's denial of the motion for rehearing *en banc*:

> The panel's departure in the case before us is particularly striking where the contractual *language* is undeniably ambiguous and where the extrinsic evidence reveals that all the parties intended that the retirees' coverage was for life. The panel's so-called default rule prevents extrinsic evidence from *ever*

> being considered by ensuring that such agreements are always "unambiguous"; if they do not say "lifetime" or "vested," then benefits necessarily terminate with the contract's termination. Such a departure from settled principles of contract interpretation is unwarranted and presents an important issue for ERISA and labor law. Critical retiree benefits are being placed at risk. This problem has nationwide ramifications and deserves our *en banc* consideration. [Pet. App. 70a (emphasis in original).]

In contrast, the Sixth Circuit—as well as the Fourth Circuit—when faced with a contract that, as here, provides retiree insurance benefits and does not contain express language as to the duration of those benefits, draws the inference—rebuttable by extrinsic evidence—that lifetime benefits were intended. The remaining courts that have considered the question here—the First, Fifth, Eighth and Ninth Circuits—proceed on the understanding that such silence creates an ambiguity that justifies resort to extrinsic evidence.

Either of the latter two approaches would lead to a result different from the result reached below on the contract language in at least four of the five agreements at issue in this case.[2] And, as we pointed out in our peti-

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[2] Respondents attempt to create the false impression that the language of only two of the five collective bargaining agreements at issue—the 1984-1986 and 1986-1988 agreements—is relevant, because retirees under earlier agreements "transferred" into the benefit plan established under the later agreements. Opp. at 4. This is incorrect; each retiree's right to insurance benefits is established by the agreement under which he or she retired. If the operative agreement at the time of an employee's retirement provides for vested lifetime insurance benefits, the language of subsequent contracts does not affect that employee's entitlement to those benefits. The court below proceeded on this understanding of the agreements here and not on respondent's "transfer" theory; that court therefore examined the language of each of the five agreements and not only the 1984-1986 and 1986-1988 agreements. Pet. App. 2a-9a. The language of each of the five agreements is set forth in the Petition at 4-7.

tion, a number of cases in other circuits involving contract language that is analytically indistinguishable from the language here have been decided contrary to the ruling below. *See* Petition at 14, 16.

Indeed, if all the court below did was "follow the traditional method of contract analysis," Opp. at 9, it is difficult to understand why the Seventh Circuit would have *sua sponte* issued an order setting for *en banc* hearing the question "[w]hether *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), should be overruled." *See* Petitioners' Supplemental Brief at 2 (quoting Order of Seventh Circuit in *Bidlack v. Wheelabrator*, No. 91-2378 (Aug. 3, 1992)).[3]

Accordingly, the petition is accurate in stating that there is a three-way conflict among the Circuits.[4]

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[3] The reality of this conflict has not been lost on the practicing bar. This fact is illustrated by recent litigation involving retiree health benefits in which an employer doing business in both the Sixth and Seventh Circuits filed a complaint in a district court in the Seventh Circuit seeking a declaration that its retirees were *not* entitled to lifetime insurance benefits, *Navistar Int. Corp., et al. v. Foster, et al.*, No. 92-C-4913 (N.D. Ill., July 28, 1992); the retirees moved to dismiss the Seventh Circuit action and promptly filed a complaint seeking a declaration that they *are* entitled to such benefits in a district court in the Sixth Circuit, *see Shy, et al. v. Navistar Int. Corp., et al.*, C-3-92-333 (S.D. Ohio, Sept. 14, 1992). As long as the current conflict goes unresolved, this type of forum shopping will routinely take place, and the outcome of retiree insurance cases will turn on where the action comes to decision.

[4] In addition to mischaracterizing the ruling in the instant case, respondents obscure the positions of other circuits, by citing to decisions where the language of the collective bargaining agreement —or unilateral employer plan—is unambiguous by any measure. There is no dispute that where the language of a collective bargaining agreement or plan is clear—either for or against the proposition that retiree insurance benefits endure for a lifetime—under any of the three rules of law described in the petition, extrinsic evidence is not admissable. *See United Steelworkers v. Connors Steel*, 855 F.2d 1499, 1501 (11th Cir. 1988) (the retiree

4. Respondents argue that this Court's decision in *Litton Financial Printing Division v. NLRB*, 111 S. Ct. 2215 (1991), buttresses the decision below, quoting the following passage:

> [A]n expired contract has by its terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. [*Id.* at 2225.]

"'shall not have such coverage terminated or reduced . . . so long as the individual remains retired from the company . . . notwithstanding the expiration of this agreement'"), *cert. denied*, 489 U.S. 1096 (1989); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 611 (6th Cir. 1985) (company will provide benefits "'during the life of the pensioner'"), *cert. denied*, 475 U.S. 1017 (1986); *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 673 (6th Cir. 1985) ("[t]he Company shall pay the cost of all group insurance premiums . . . as long as such Employee remains retired and unemployed, either by the Company or by anyone else'"); *Howe v. Varity Corp.*, 896 F.2d 1107, 1108 (8th Cir. 1990) (plan's broad reservation of a right to "'amend or terminate'" allowed the employer (a company in receivership) to terminate benefits); *Pierce v. Security Trust Life Ins.*, 1992 WL 214042, 214047 (4th Cir. July 22, 1992) (*per curiam*) ("'[plan] reserves the right to change or terminate the Plan at any time'"); *Alday v. Container Corp.*, 906 F.2d 660, 662 (11th Cir. 1990) (plan administrators may "'terminate, suspend, withdraw, amend or modify the Plan in whole or in part at any time'"), *cert. denied*, 111 S. Ct. 675 (1991); *Musto v. American Gen. Corp.*, 861 F.2d 897, 903, 904 (6th Cir. 1988) ("'insurance coverage . . . may be amended or discontinued at any time, and the Company reserves the right to determine new premium contributions at any time'"; "'since it is not possible to foresee the future, the Company must reserve the right to change or even discontinue these provisions if it becomes necessary'"), *cert. denied*, 490 U.S. 1020 (1989).

Respondents' assertion that there is a conflict within the Sixth Circuit, Opp. at 17-18, is similarly based on its refusal to recognize that certain cases involve contract or plan language that would be considered clear or unambiguous under any of the three approaches taken by courts of appeals in retiree insurance cases, including courts of appeals employing the *Yard-Man* inference. *See Musto v. American General Corp.*, *supra*.

This passage acknowledges that an employer's obligation to provide benefits beyond the term of a contract may be "already fixed under the contract." The *Litton* Court, moreover, made it clear that such a contractual obligation may arise from "the express *or implied* terms of the expired agreement itself." 111 S. Ct. at 2224 (emphasis supplied) (citing *Nolde Bros., Inc. v. Bakery Workers*, 430 U.S. 243 (1977)). And, in determining what terms of the agreement may be implied—including the intended duration of contractual obligations—the *Litton* Court states that courts should utilize "normal principles of contract interpretation." 111 S. Ct. at 2225.

Under "normal principles of contract interpretation," courts interpreting a collective bargaining agreement read the language of the contract and, if it is subject to differing interpretations, examine extrinsic evidence as an aid to determining the intent of the parties. Thus, to the extent it can be said to address the issue here, the *Litton* Court's analysis cuts against the rule of contract interpretation adopted by the court below.

5. Finally, respondents argue that the Seventh Circuit's *en banc* resolution of *Bidlack v. Wheelabrator*, *supra*, will not alter the analysis, or the result reached, in the decison below, and that there is, thus, no reason to hold the petition here pending that *en banc* decision. Opp. at 25-26. This is a surprising line of argument in light of the express terms of the Seventh Circuit *sua sponte* order, requiring the parties in *Bidlack v. Wheelabrator* to brief the question "[w]hether *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992), should be overruled." *See* Petitioners' Supplemental Brief at 2 (quoting Order of the Seventh Circuit in *Bidlack v. Wheelabrator*, No. 91-2378 (Aug. 3, 1982)).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for certiorari, the petition for writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

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No. 92-216

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REASONS THE WRIT SHOULD BE DENIED

The United States Court of Appeals for the Seventh Circuit granted hearing *en banc* in *Bidlack v. Wheelabrator Corp.*, No. 91-2378, in part to consider the question whether to overrule *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806, *reh'g denied en banc*, 962 F.2d

655 (7th Cir. 1992) (its decision in this case[1]). The Petitioners in *Senn* asked this Court to withhold action on the Petition for Certiorari, pending the Court of Appeals's ruling in *Bidlack*, and, if the Seventh Circuit overruled *Senn*, to vacate its decision in *Senn* and remand it to the Seventh Circuit in light of *Bidlack*. (Petitioners' Supplemental Brief at 2.)

That will not be necessary. The Seventh Circuit just released its *en banc* decision in *Bidlack v. Wheelabrator*, No. 91-2378, slip op., 1993 U.S. App. Lexis 11509 (7th Cir. May 18, 1993). That court did *not* overrule *Senn*. Rather, seven of the ten judges (three signing Judge Posner's lead opinion, and the four dissenters) specifically endorsed the result and reasoning of *Senn*: its holding that extrinsic evidence cannot create an ambiguity in otherwise clear documents, its holding that silence is not ambiguity, and its holding that health and welfare benefits promised in collective bargaining agreements presumptively expire with those agreements. *Bidlack v. Wheelabrator*, slip op. at 6, 8-9 (Posner, J.), 26 (Easterbrook, J., dissenting).

The dividing lines between the three opinions in *Bidlack* aptly illustrate why this Court should not grant the Petition for Writ of Certiorari in this case. In *Bidlack*, slip op. at 6-8, Judge Posner's lead opinion (joined by Judges Flaum and Kanne) recognized three approaches to the issue whether welfare benefits provided retirees by a collective bargaining agreement vest for life on retirement:

---

[1] Respondent United Dominion Industries, Inc. is a publicly held corporation traded on the New York, Montreal and Toronto Stock Exchanges. Respondent PST, Inc. is a subsidiary of United Dominion Industries, Inc. Respondent Pressed Steel Tank Co., Inc. is a privately held corporation with no parent or subsidiary corporations.

a "strong presumption" that such benefits expire with the agreement, unless the contract either uses the word "vest" or states unequivocally that benefits outlast the contract; a "weak presumption" that such benefits expire with the agreement, absent either an express vesting provision or ambiguous contract language that could reasonably be so construed; and a "parol substitution" rule, i.e., a rule that permits a retiree to use extrinsic evidence to add to the agreement a vesting term that does not appear in it. Under each of these approaches, the proponent of vesting (usually a retiree) retains the burden of proof. Judge Posner adopted the weak presumption against vesting: an approach consistent with traditional contract principles, and the rule actually applied in *Senn*. Judge Cudahy's opinion concurring in the judgment (joined by Judges Ripple and Rovner) recognized three additional possibilities—a strong presumption, a weak presumption, and a parol substitution rule in *favor* of vesting; in each case the former employer would bear the burden of proving there was *no* agreement to vest benefits on retirement. Judge Cudahy favored a weak presumption in favor of vesting. Judge Easterbrook's dissent (joined by Chief Judge Bauer and Judges Coffey and Manion) advocated a strong presumption against vesting.

The result in *Bidlack* was to reverse a summary judgment in favor of the employer on the retiree class's claim that it possessed vested "lifetime" health benefits. This result made Judge Easterbrook's opinion the dissent, but in its reasoning the plurality opinion. To summarize:

1. a majority of the court (7 of 10) required *some* presumption against vesting;
2. a majority of the court (7 of 10) specifically reaffirmed its decision in *Senn*, both its result and its reasoning; and

3. a plurality of the court (4 of 10) endorsed a *strong* presumption against vesting.

As earlier stated, the "weak presumption" that benefits do not vest, adopted by Judge Posner's opinion in *Bidlack*, follows traditional contract principles and is exactly the analysis followed in *Senn*. Both opinions start with the presumption that the entitlements provided by collective bargaining agreements expire when the agreements do. *Bidlack*, slip op. at 6; *Senn*, Pet. App. 17a-18a. Although extrinsic evidence may be used to explicate an ambiguous term of the agreement, *Bidlack*, slip op. at 8; *Senn*, Pet. App. 18a, extrinsic evidence is admissible only where there is actual contract language which is ambiguous, that is, which can reasonably be read two ways. *Ibid.* and *ibid.* Extrinsic evidence may *not* be used to add to a written agreement terms that are not in fact in the agreement. *Ibid.* and *ibid.* And contractual silence on the duration of retiree health benefits does *not* constitute an ambiguity and does *not* allow resort to extrinsic evidence. *Bidlack*, slip op. at 8-9; *Senn*, Pet. App. 21a. Jot for jot, Judge Posner's analysis in *Bidlack* follows the panel's analysis in *Senn*.

That is not what Petitioners would have this Court believe, and not what they told the Court in their Petition. They told the Court that the *Senn* "default rule" is the "strong presumption" favored by the plurality, dissenting opinion in *Bidlack*:

> a "default rule," that, in the absence of a clear and express statement in the agreement that the retiree insurance benefits are intended to continue beyond the term of the contract, " 'entitlements established by collective bargaining agreements do not survive [the contract's] expiration or modification.' " [*Senn*,] 951 F.2d at 816.

Petition at 13.

But not so. This is what the Court of Appeals really wrote in this case:

> [I]n the absence of an agreement to the contrary, a company is not obligated to continue retiree welfare benefits after the expiration of the contract:
>
> "The entitlements established by collective bargaining agreements do not survive their expiration or modification."

Senn, Pet. App. 17a, *quoting Merk v. Jewel Cos.*, 848 F.2d 761, 763 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988). The court held an "agreement" was both necessary and sufficient, and said nothing about requiring a "clear and express statement"; Petitioners made that part up. The *Senn* panel did not adopt the strong presumption because it did not have to. Federal courts do not decide questions that are not squarely presented to them. The *Senn* panel did not have to choose between the strong and weak presumptions against vesting because, on the record in *Senn*, the court was compelled to hold that benefits did *not* vest under either approach. Indeed, on the record in this case—a record which includes:

- *no* provision for vesting or post-contract duration of retiree benefits;
- *no* ambiguous provision that could be interpreted that way;
- *no* extrinsic evidence of an agreement for vesting; and
- *express*, unambiguous provisions in the last two agreements that retiree health benefits would terminate when the collective bargaining agreement expired—

the court had no choice but to hold for the employer under *any* of the six approaches recognized by Judge Cudahy's concurring opinion in *Bidlack*—under any rule,

in fact, short of a statute requiring welfare benefits, like pension benefits, to vest as a matter of law.

There's the rub, the reason this Court should not grant the Petition in this case. Regardless which rule this Court might announce, its opinion will be advisory, because it will make no difference to the result in this case. There is no arguably-ambiguous contract language on which this Court can ground a discussion of the ambiguity issue. There is no extrinsic evidence in the record—no bargaining notes, no evidence that the parties negotiated a lifetime benefits agreement, no oral or written representation of lifetime benefits, no past practice, nothing but the Plaintiffs' subjective assumptions—which the Court can evaluate to determine whether, when, and to what extent extrinsic evidence should be used. The contract language in the last two agreements is too explicit for the allocation of the burden of proof to make any difference in the result. If the Court ever does take a retiree health benefits case—if the other two branches of government do not moot the issue entire before the Court's next Term ends—it should accept a case it can adjudicate. One in which its opinion will announce not just a rule of law, but a decision in the case.

A final word about Judge Cudahy's concurrence in *Bidlack v. Wheelabrator*. Although Judge Cudahy recognizes six conceivable approaches to the retiree benefits issue, that does not mean that the judicial circuits are split six ways—or split at all. The two opinions for reversal in *Bidlack*, which analyze and reject the strong presumptions, cite no decision that employs either one. The Petition in this case contends that no circuit, other than the Seventh Circuit in *Senn*, employs the strong presumption against vesting, but Petitioners have just been proven wrong

about that. Petition at 12-17; *cf. Bidlack*, slip op. at 6-7 (Posner, J.), 17-18 (Cudahy, J.). No court accepts either "parol substitution" rule: both because it would effectively destroy the very concept of a contract, *Bidlack*, slip op. at 7-8 (Posner, J.), and because it is specifically prohibited by ERISA.[2]

Every circuit follows the weak presumption of non-vesting—that is, the application of traditional contract principles, including the principle that the burden of proof (both of going forward and of persuasion) that a promise was included in a contract, lies with the party seeking to enforce the promise. The Sixth Circuit, with its "inference" proposed in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1480 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), may be an exception. Or perhaps not. Although most Courts of Appeals have rejected the *Yard-Man* "inference" outright, either expressly or implicitly, *see Bidlack*; Respondent's Brief in Opposition to Petition for Writ of Certiorari at 13-17, a more recent decision discounted the *Yard-Man* "inference" as nothing to get excited about—simply a tool the *Yard-Man* court used to confirm its resolution of already-sufficient plan language in the absence of extrinsic evidence. *In re*

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[2] "Every benefit plan shall be established and maintained pursuant to a written instrument." Employee Retirement Income Security Act of 1974 ("ERISA"), § 402(a)(1), 29 U.S.C. § 1102(a)(1). This provision is universally interpreted as a statute of frauds that prohibits parol modifications or additions to benefit plans. *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989); *Musto v. American General Life Ins. Co.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

Morse Tool, Inc., 148 B.R. 97, 146-147 (Bankr. D. Mass. 1992).[3]

If there ever was a split between the Sixth Circuit and the rest, that gap appears to be closing. The Sixth Circuit's most recent pronouncements either studiously ignored the *Yard-Man* "inference," *Gill v. Moco Thermal Industries, Inc.*, 981 F.2d 858 (6th Cir. 1992), or adverted to it and then declined to apply it, *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1003, 1004-5 (6th Cir. 1993) (an opinion written by Senior Judge Bailey Brown, a member of the *Yard-Man* panel). Respondents predicted in their Brief, filed last September, that the Sixth Circuit—prodded by this Court's decision and reasoning in *Litton Financial Printing Div'n v. NLRB*, 111 S. Ct. 2215 (1991)—would bring itself into line with all the other Circuits, and heal whatever conflict between the Circuits might once have obtained. That prediction may already have come to pass. And *Bidlack* will only help the healing along.

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[3] The *Morse Tool* court, 148 B.R. at 145, also expressly rejected Petitioners' contention (Petition at 16) that the First Circuit approved, or even considered, the *Yard-Man* "inference" in *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987).

CONCLUSION

Respondents respectfully pray this Court to DENY the Petition for Writ of Certiorari.

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SECOND SUPPLEMENTAL BRIEF

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SECOND SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, petitioners file this supplemental brief to discuss the Seventh Circuit's *en banc* decision in *Bidlack v. Wheelabrator*, No. 91-2378 (May 18, 1993) ("*Bidlack*"). As we show, *Bidlack* confirms that the circuits are in conflict as to the legal rules for ascertaining the intended duration of collectively-bargained entitlements to retiree insurance benefits. The question posed by that conflict is squarely presented by the instant case and by our petition and is in need of resolution by this Court.

1. In a prior supplemental brief filed on August 25, 1992, petitioners informed the Court that in *Bidlack*, the Seventh Circuit had issued an order setting for hearing before the court *en banc* the question whether its earlier

decision in this case should be overruled. In light of that order, petitioners requested, *inter alia*, that this Court hold the petition in *Senn* in abeyance until the Seventh Circuit decided *Bidlack*. The *Senn certiorari* petition continues to be pending. The Seventh Circuit has now issued its *Bidlack* decision.

2. In *Bidlack* the retired employees of Wheelabrator Corporation sought to enforce collectively-bargained rights to health insurance benefits for life. The district court granted summary judgment for the company holding that the operative contract language "reveals no intention on Wheelabrator's part to provide pre-1986 retirees the same level of benefits at no cost for life" and that such an intention may not be proven with extrinsic evidence. Slip Op. at 2 (quoting district court opinion).[1] The *en banc* Seventh Circuit reversed and remanded holding that the contract language at issue in *Bidlack* is ambiguous and that extrinsic evidence should be admitted as an aid to its interpretation.

3. The upshot of the several opinions in *Bidlack* is that the *Senn* presumption against the continuation of retiree benefits beyond contract expiration continues to be the Seventh Circuit law, albeit in modified form.

The lead *Bidlack* opinion, written by Judge Posner and joined by two other judges, adopts the *Senn* presumption against vesting:

> No doubt a court should cast a cold eye on contentions that a contract with a fixed term actually

---

[1] The operative contract language in *Bidlack* is as follows: "those employees who have retired since September 22, 1959, will have the full cost of their Blue Cross-Blue Shield coverage paid by the Company after they attain sixty-five (65) years of age," and will be entitled to supplemental health benefits "which, combined with Medicare, will provide a level of benefits equal to the Wheelabrator Blue Cross-Blue Shield plan for active and retired employees sixty-five (65) years of age or over" and which "shall be continued for the spouse after the death of the retiree." Slip Op. at 3-4.

> created a perpetual obligation . . ., and should, therefore, as *Senn* and many other cases hold . . ., presume that a collective bargaining agreement ceases to obligate the employer when the agreement's term . . . is up. [Slip Op. at 6 (citations omitted).]

Judge Posner's opinion goes on to address what is necessary to rebut this presumption. As we read his opinion, Judge Posner modifies *Senn* by "rejecting" the proposition that "the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires," *id.*, or be interpreted as providing health benefits only during its term. Rather, Judge Posner concludes, if the contract language is sufficiently equivocal on the intended duration of retiree health benefits, it would then be appropriate to consider extrinsic evidence and to apply the presumption against vesting "*after* extrinsic evidence has been considered." *Id.* at 11 (emphasis in original).[2]

Judge Cudahy, writing for two other judges, characterizes Judge Posner's opinion as adopting a "weak no-vest rule," Slip Op. at 15. In contrast, Judge Cudahy would opt for the rebuttable presumption in *favor* of vesting adopted by the Sixth Circuit in *International Union, United Auto, etc. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984):

> I would lean toward . . . application of the weak vest rule—the position adopted by the Sixth Circuit in the seminal case, *International Union, United Auto, etc. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). *See*

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[2] Judge Posner's opinion does not provide any clear standard for determining when contract language will present an ambiguity sufficient to trigger consideration of extrinsic evidence. In this regard, Judge Posner suggests that the contract language in *Senn*—"the company 'will continue for retired employees' a specified premium contribution" (Slip Op. at 9)—may be too "weak[]" to create an ambiguity as to the intended duration of that benefit.

> *also Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (citing *Yard-Man* as "consistent with a more far-reaching understanding of the context in which retiree benefits arise."); *Local Union No. 150-A, United Food & Commercial Workers, etc. v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985) (inferring that benefits vested because "[t]here is simply no evidence that the Company and the Union did not intend to vest the right to benefits in the retirees."). [Slip Op. at 20.]

Judge Easterbrook, writing for himself and three other judges, states that the result of the various opinions in *Bidlack* is a reaffirmation of the *Senn* presumption:

> A majority of this court (the three judges subscribing to the lead opinion plus the four joining this one) reaffirms *Senn*—not only its holding that extrinsic evidence cannot create an ambiguity in otherwise clear documents, but also its holding that health and welfare benefits promised in collective bargaining agreements presumptively expire with those agreements. [Slip Op. at 26.]

4. After *Bidlack*, as before, the conflict between the circuits described in our petition continues to exist. We cannot improve on Judge Easterbrook's description of the current state of the law in the circuits with respect to the question presented here:

> Uncertainty now reigns. In at least one circuit health and welfare benefits mentioned in collective bargaining agreements presumptively vest on retirement. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). In this circuit such benefits presumptively do not vest, but the presumption is weak. Other circuits have still other formulae. E.g., *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988). And in most circuits employers retain complete freedom to alter retirees' health benefits in the absence of collective bargaining agreements . . . . Employers with national operations are subject to multiple and inconsistent rules, com-

> pounded by the uncertainty inherent in sending big-stakes questions to the constantly-changing panels that are juries. See Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees,* 5 DePaul Bus. L.J. 139, 145-60 (1992) (cataloging six distinct approaches). Uncertainty never promotes industry. Risk is an uncompensated, and substantial, cost of operations, and in this respect the fortunes of labor, capital, and consumers—that is, of us all—are linked. [Slip Op. at 34]

5. This case provides an appropriate vehicle for resolving the uncertainty described by Judge Easterbrook. To be sure, it is possible that if this Court were to effect a remand of this case to the Seventh Circuit, that court might conclude that *Bidlack*'s gloss on the *Senn* presumption leads to a result different from the result reached by the panel decision in this case. *See* note 1, *supra.*

But we submit that this possibility does not justify putting off to another day, or another case, this Court's resolution of the circuit conflict that is squarely presented here and that, as Judge Easterbrook notes, subjects national employers, and their unions, employees and retirees to "multiple and inconsistent rules" and to having the resulting "big stakes questions" decided by "the constantly-changing panels that are juries." The contract language here—the company "will continue for retired employees" the health insurance benefits in question—is simple and straight-forward. The question presented is the proper legal standard to be applied in interpreting such a provision. That is a pure question of law for this Court and it is ripe for decision. For all the reasons already stated, that legal standard needs to be determined by this Court in prompt fashion.

CONCLUSION

For the reasons set forth in the petition for certiorari, petitioners' reply brief, and petitioners' two supplemental briefs, the Court should grant the petition for certiorari.

Respectfully submitted,

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